
Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN
ASSOCIATION, INC., ET AL.,

Petitioners,

against

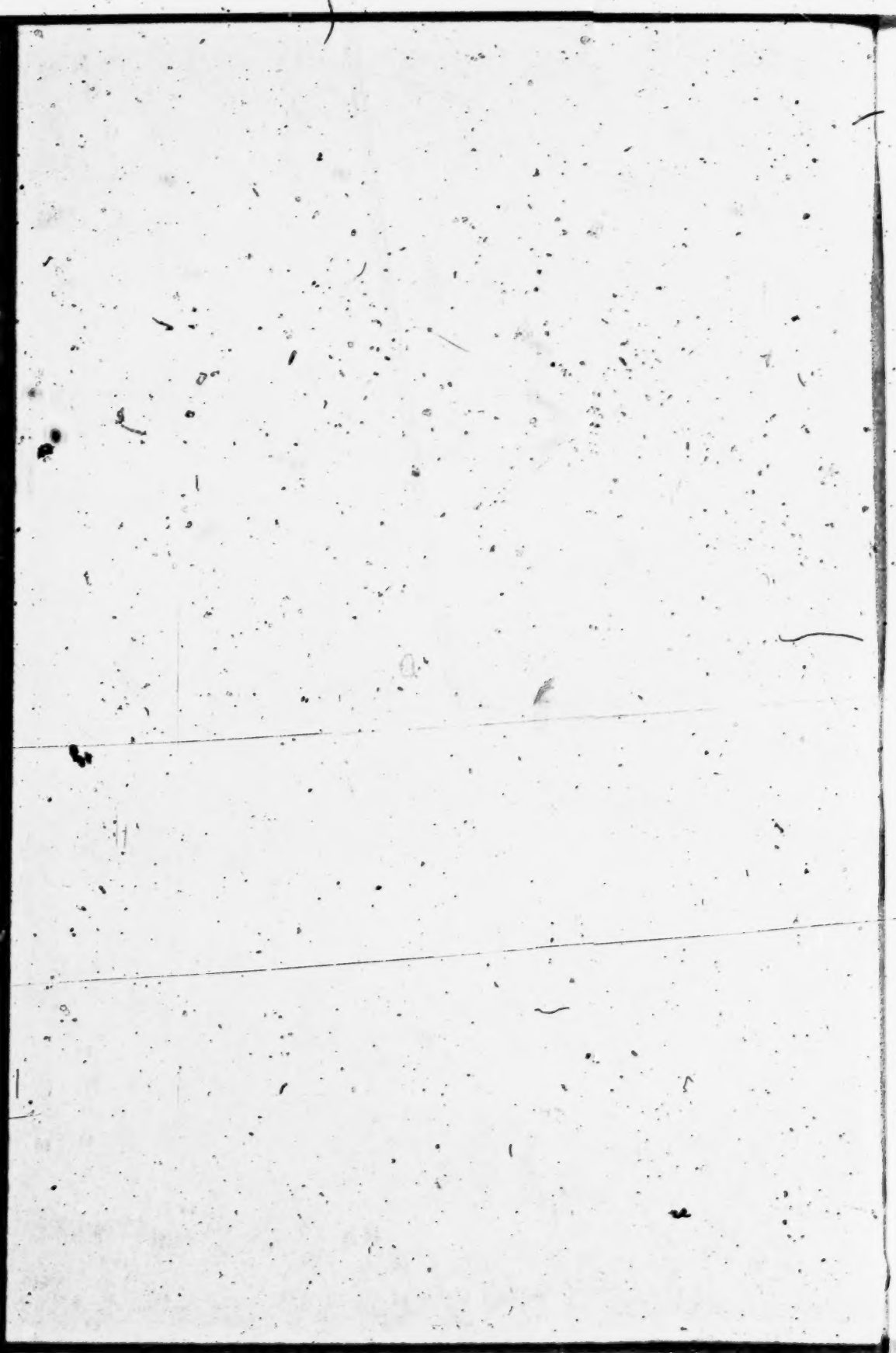
COMMISSIONER OF SANITATION OF THE
CITY OF NEW YORK, ET AL.,

Respondents.

JOINT APPENDIX

Rabinowitz, Boudin & Standard,
Attorneys for Petitioners,
30 East 42nd Street,
New York City.

J. Lee Rankin,
Corporation Counsel of the City of New York,
Attorney for Respondents,
Municipal Building,
New York City.



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United States District Court
For the Southern District of New York

Civil Action File No. 4307

UNIFORMED SANITATION MEN ASSOCIATION, INC., LEONARD
MONTELEONE, AUGUST MASCIA, JOSEPH MIRANDA, NUNZIO
CHIERICO, BERNARD F. BELLETTIERE, NICHOLAS J. CARUSO,
ANSELMO QUINONES, ANTHONY CALABRESE, JAMES D. MIN-
TER, MARCUS F. KING, JOSEPH BARBARA, PETER I. LOMBARDI,
PHILIP D'AGOSTINO, ANTHONY D'AMBROSIO, JOHN L.
ALESSIO and MICHAEL A. MANGO,

Plaintiffs,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK,
COMMISSIONER OF INVESTIGATION OF THE CITY OF NEW
YORK, and THE CITY OF NEW YORK,

Defendants.

Docket Entries

Date

Proceedings

Dec. 14-66—Filed complaint and issued summons.

Dec. 19-66—Filed def't's affdvt. & show cause order to
dismiss, etc.—ret. 12-20-66.

Dec. 19-66—Filed pl'tff's affdvt. & show cause order to
enjoin, etc.—ret. 12-20-66.

Docket Entries

- | Date | Proceedings |
|------------|--|
| Dec. 19-66 | Filed summons & return, served Commr. of Sanitation of City of NY by Mr. L. Mendelson—12-15-66; served Commr. of Investigation of NY by Mr. Arnold G. Fraiman—12-15-66; served City of NY by Mrs. A. Schonbuch—12-15-66. |
| Dec. 20-66 | Filed stip. & order amending the complaint as indicated—Cannella, J. |
| Dec. 21-66 | Filed in court deft's memorandum in support of motion to dismiss. |
| Dec. 21-66 | Filed in court pltff's reply memorandum. |
| Dec. 21-66 | Filed in court pltff's memorandum. |
| Dec. 27-66 | Filed memorandum Opinion #33086—pltff's motion for declaratory judgment & for prelinjunction are denied without prejudice—& deft's motion to dismiss the complaint is granted—So Ordered—Cannella, J M/N. |
| Jan. 4-67 | Filed pltff's notice of appeal—mailed copies to Leon Mendelson; Commr. Arnold G. Fraiman & J. Lee Rankin. |
| Dec. 21-66 | Filed affdvt. of Leonard B. Boudin (filed in court). |

Docket Entries for the Court of Appeals

Date	Proceedings
Jan. 4, 67	– Filed record (original papers of District Court)
Feb. 2, 67	– Filed order extending time to file appellants' brief and joint appendix to Feb. 17, 1967
Feb. 17, 67	– Filed joint appendix
Feb. 17, 67	– Filed brief, appellants'
Mar. 9, 67	– Filed brief, appellees'
Mar. 22, 67	– Filed reply brief, appellants'
Mar. 23, 67	– Argument heard (by: Moore, Hays, CJJ and Dooling, DJ)
July 13, 67	– Filed order permitting appellants to submit additional material and appellees to reply
July 27, 67	– Filed supplemental memorandum, appellants'
Aug. 17, 67	– Filed supplemental memorandum, appellees'
Sept. 20, 67	– Judgment Affirmed, Hays, CJ
Sept. 20, 67	– Filed judgment
Sept. 26, 67	– Certified appendix and proceedings to Rabowitz & Boudin, Esqs.
Oct. 6, 67	– Issued Mandate (opinion and judgment)
Nov. 17, 67	– Filed notice of filing of petition for writ of certiorari
Feb. 6, 68	– Filed certified copy of order of Supreme Court granting petition for writ of certiorari

Summons

(R. p. 97)

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Civil Action File No. 4307

[SAME TITLE]

To the above named Defendants:

You are hereby summoned and required to serve upon Rabinowitz & Boudin, plaintiff's attorneys, whose address is 30 East 42nd Street, New York, N. Y. 10017, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

**JOHN J. OLEAR, JR.,
Clerk of Court.**

**HARRY C. KREINIK,
Deputy Clerk.**

[Seal of Court]

Date: Dec. 14, 1966.

Complaint for Declaratory Judgment and Injunction

(R. pp. 1-10)

UNITED STATES DISTRICT COURT**SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

The plaintiffs by their attorneys, complaining of the defendants, allege:

1. The Court has jurisdiction of this action under Article 1, § 10 of the United States Constitution, under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; under § 605 of the Federal Communications Act of June 19, 1934, 47 U.S.C. § 605, 48 Stat. 1103; and under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1337, 1343, 2201 and 2202.

2. The plaintiff, Uniformed Sanitation Men Association, Inc. (herein "the Union") is a labor union incorporated under the laws of the State of New York, and known generally as Uniformed Sanitationmen's Association, Local 831, I.B.T. Its principal office is at 25 Cliff Street in the Borough of Manhattan, City of New York.

3. The Union is the collective bargaining agent of the approximately 10,000 sanitationmen employed by the Department of Sanitation in the City of New York, having been certified as such on August 5, 1958 by the Commissioner of Labor of the City of New York. Thereafter, in November 1965, the Union entered into a collective labor bargaining agreement with the City of New York on behalf of the said employees, which agreement established their

Complaint for Declaratory Judgment and Injunction

terms and conditions of employment, effective July 1, 1965; the said agreement is presently in effect.

4. Each of the following individual plaintiffs is a citizen of the United States and is a member of and duly represented by the Union, is a sanitationman with tenure as a classified civil service employee under the New York Civil Service Law and is and has been employed by the City of New York in the Department of Sanitation for the period specified below:

<i>Name</i>	<i>Years Employed</i>
Anthony Calabrese	36
Nunzio Chierico	13
Joseph Miranda	13
Michael A. Mango	16
Peter I. Lombardo	18
John Alessio	15
James Minter	11
Nicholas J. Caruso	17
Anselmo Quinones	14
Marcus F. King	16
Philip D'Agostino	18

5. Each of the following individual plaintiffs is a citizen of the United States, has tenure as a classified civil service employee under the New York Civil Service Law, and is and has been employed by the City of New York in the Department of Sanitation for the period of time set forth below and is presently employed in the supervisory capacity indicated:

<i>Name</i>	<i>Years Employed</i>
Bernard F. Bellettiere, Foreman	18
August Mascia, Asst. Foreman	22
Joseph M. Barbara, Asst. Foreman	36
Anthony D'Ambrosio, Asst. Foreman	23
Leonard Monteleone, Asst. Foreman	24

Complaint for Declaratory Judgment and Injunction

6. The defendant, Commissioner of Sanitation of the City of New York; is the head of the Department of Sanitation of that city under § 752 of the New York City Charter, with supervisory power over the department's employees under § 752-6.0 of the Administrative Code of the City of New York; the defendant, Commissioner of Investigation of the City of New York, is the head of the Department of Investigation of that city under § 801 of the said Charter with the duty of conducting any investigation directed by the Mayor or City Council, or which in the Commissioner's opinion may be in the best interests of the city; and the defendant, City of New York, is a municipal corporation which employs the individual plaintiffs herein. Each of the said defendants has his or its principal place of business in the Southern District of New York.

7. None of the plaintiffs has ever been convicted of crime; the plaintiffs James D. Minter, August Mascia, Marcus F. King, Leonard Monteleone, Joseph Miranda, Peter I. Lombardo, Joseph Alessio, Michael A. Mango, Bernard F. Bellettiere and Anselmo Quinones served and received honorable discharges during the second World War in the military forces of the United States, the last three named now being disabled war veterans presently receiving federal disability benefits.

8. In November 1966, each of the individual plaintiffs was directed by the Commissioner of Investigation to appear at hearings before him at which time each of them was put under oath and interrogated by the Commissioner. Each of them, except the plaintiffs Anthony Calabrese, Anthony D'Ambrosio and Leonard Monteleone, declined to respond, relying on his privilege against self-incrimination guaranteed him by the federal and state Constitutions; the plaintiff John L. Alessio not being competent to answer the questions, also declined to respond.

Complaint for Declaratory Judgment and Injunction

9. The investigation conducted by the Commissioner of Investigation was the result of, and was accompanied by, the interception and divulging of telephone conversations to which the individual plaintiffs were parties, without the consent of the senders thereof.

10. At the hearings involving the individual plaintiffs Michael A. Mango, Bernard F. Bellettiere, James D. Minter, August Mascia, Anselmo Quinones, Joseph Barbara, Anthony Calabrese and Joseph Miranda, the Commissioner of Investigation played what he described as recordings of telephone conversations between the said individual plaintiffs, other employees of the Department of Sanitation, and other persons; at the hearings involving Joseph M. Barbara, Marcus F. King, Nunzio Chierico and Peter I. Lombardo, the Commissioner of Investigation stated directly and by implication, that such recordings had been made and were in his possession.

11. Thereafter, on or about December 2, 1966, the Commissioner of Sanitation notified the individual plaintiffs who had asserted their constitutional privilege against self-incrimination that they were suspended immediately without pay for that reason; and the Commissioner notified the individual plaintiffs, Anthony Calabrese, Anthony D'Ambrosio, Leonard Monteleone and John L. Alessio, that they were suspended without pay by reason of "information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation."

12. The defendants' action, including the suspension from duty without pay of the individual plaintiffs and their prospective dismissals from employment under § 1123 of the New York City Charter for their assertion of their constitutional privilege against self-incrimination, are unlawful in that:

Complaint for Declaratory Judgment and Injunction

a) they violate the said plaintiffs' rights to due process under the Fourteenth Amendment to the Constitution of the United States;

b) they violate the plaintiffs' federal constitutional privilege against self-incrimination as set forth in the Fifth Amendment to the Constitution of the United States and as incorporated into the Fourteenth Amendment to the Constitution;

c) they deprive the plaintiffs under color of the City Charter of the rights, privileges and immunities secured to them by the Constitution of the United States.

13. Upon information and belief, the investigation conducted by the Commissioner of Investigation, described in paragraph 9 above, was in violation of §§ 501 and 605 of the Communications Act of 1934, 47 U.S.C. §§ 501, 605, the Regulations, Orders and Decisions of the Federal Communications Commission, and said acts violated the individual plaintiffs' rights under the Fourth and Fourteenth Amendments to the United States Constitution against unreasonable searches and seizures and against invasions of their privacy.

14. Section 1123 of the New York City Charter is repugnant to the guarantee of due process and to the privilege against self-incrimination provided in the Fifth and Fourteenth Amendments to the United States Constitution, and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

15. With respect to each one of the plaintiffs, the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs.

Complaint for Declaratory Judgment and Injunction

16. The plaintiffs have exhausted their administrative remedies.

17. The defendants' action have caused, are causing and will continue to cause the plaintiffs irreparable injury for which they have no adequate remedy at law.

WHEREFORE, the plaintiffs pray for a judgment

1. Declaring that

(a) Section 1123 of the New York City Charter and the suspension of the individual plaintiffs and their prospective hearings and discharges under the said Charter provision, are in violation of the individual plaintiffs' federal privilege against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States, as incorporated in the Fourteenth Amendment to the said Constitution;

(b) The said Charter mandate of the dismissal of employees for assertion of their federal constitutional privilege against self-incrimination, and, as construed by the defendants for their immediate suspension from employment, abridges the privileges and immunities of the individual plaintiffs as citizens of the United States in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States;

(c) The said Charter provision authorizing the suspension and dismissal from employment for assertion of the privilege deprives the plaintiff employees of their liberty and property without due process in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States;

(d) The said Charter provision authorizing the suspension of said employees from their employment by rea-

Complaint for Declaratory Judgment and Injunction

son of their assertion of constitutional privilege denies the individual employees the equal protection of the laws to which they are entitled under § 1 of the Fourteenth Amendment to the Constitution of the United States in that the Charter provision arbitrarily and indiscriminately denies municipal employees the exercise of their constitutional rights as a condition to retaining employment;

(e) The said investigation by the Department of Investigation and the suspensions from employment of the individual plaintiffs by the Commissioner of Sanitation and his prospective discharges of the individual plaintiffs are in violation of §§ 501 and 605 of the Federal Communications Act, 47 U.S.C. §§ 501, 605; 48 Stat. 1103, and are the result of an unlawful search and seizure in violation of the Fourth Amendment as incorporated into the Fourteenth Amendment and in violation of the individual plaintiffs' right to privacy under the First, Fourth and Ninth Amendments to the Constitution of the United States.

2. Enjoining the defendants permanently and during the pendency of this action from continuing to engage in the interception, divulging, recording and publication of telephone conversations among the plaintiffs or between the plaintiffs and other persons.

3. Enjoining the defendant Commissioner of Sanitation permanently and during the pendency of this action, from:

(a) Continuing the suspensions from employment of the individual plaintiffs, conducting any further investigation or hearings and issuing any charges based, in whole or in part, directly or indirectly, upon the individual plaintiffs' assertion of their constitutional privilege against self-incrimination or based upon the aforesaid intercep-

Complaint for Declaratory Judgment and Injunction

tion; divulgence, recording or publication of telephone conversations.

4. Directing the defendants Commissioner of Sanitation and the City of New York to restore the individual plaintiffs forthwith to their employment with full back pay to the date of their suspension, and to take all necessary steps to restore to them as of the date of their suspension all of their benefits, privileges and prerogatives, including those relating to retirement and pensions, hospitalization insurance and health insurance; and for such other and further relief as may be just and proper.

RABINOWITZ & BOUDIN

By LEONARD B. BOUDIN,

• Member of the Firm,
30 East 42nd Street,
New York, N. Y.

MORRIS WEISSBERG,

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JOHN J. DELURY, JR.,

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Attorneys for Plaintiffs.

Order to Show Cause on Plaintiffs' Motion**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****(R. pp. 34-96)**

[SAME TITLE]

Upon the summons and complaint herein, and upon the annexed affidavit of John J. DeLury, sworn to December 14, 1966; Leonard Monteleone, sworn to December 8, 1966; August Mascia, sworn to December 9, 1966; Joseph Miranda, sworn to December 8, 1966; Nunzio Chierico, sworn to December 8, 1966; Bernard F. Bellettieri, sworn to December 8, 1966; Nicholas J. Caruso, sworn to December 8, 1966; Anselmo Quinones, sworn to December 9, 1966; Anthony Calabrese, sworn to December 9, 1966; James D. Minter, sworn to December 9, 1966; Marcus F. King, sworn to December 9, 1966; Joseph Barbara, sworn to December 8, 1966; Peter I. Lombardo, sworn to December 8, 1966; Philip D'Agostino, sworn to December 8, 1966; Anthony D'Ambrosio, sworn to December 8, 1966; John L. Alessio, sworn to December 12, 1966; and Michael A. Mango, sworn to December 9, 1966.

LET the defendants show cause before this Court at a civil motion part thereof, to be held in Room 506 of the United States Courthouse, Foley Square, New York, N. Y., on the 20th day of December, 1966, at 10:30 a.m. why an order should not be granted:

A. Enjoining the defendant Commissioner of Investigation and all persons acting in concert with him, during the pendency of this action,

Order to Show Cause on Plaintiffs' Motion

(1) from continuing to intercept, record, divulge or publish telephone conversations to which any of the plaintiffs herein were or are parties,

(2) from conducting any investigation based upon information directly or indirectly obtained by means of the interception, recording, divulging or publishing of telephone conversations to which any of the plaintiffs herein were or are parties.

B. Enjoining the defendant Commissioner of Sanitation, during the pendency of this action,

(P) from continuing the suspensions from employment of the individual plaintiffs,

(2) from conducting any investigation or hearing and from issuing any charges based in whole or in part upon the assertion by the individual plaintiffs of their constitutional privilege against self-incrimination or based in whole or in part upon information obtained by intercepting, recording, divulging or publishing of telephone conversations to which any of plaintiffs were parties.

C. Directing the defendants to appear for oral examination with respect to the issues in this case pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, and directing the defendants, pursuant to Rule 34 of the Federal Rules of Civil Procedure, to produce and permit the inspection and copying of (i) all recordings of telephone conversations to which any of the plaintiffs were parties, made by or in the possession of any of the defendants, (ii) transcripts of the interviews or hearings conducted by the Commissioner of Investigation with respect to the individual plaintiffs herein, and (iii) all communications between the Commissioner of Investigation and other persons or agencies concerning the investigation conducted by the Commissioner of Investigation, the assertion by

Order to Show Cause on Plaintiffs' Motion

any of the plaintiffs of their constitutional privilege against self-incrimination, and the interception of telephone conversations to which any of the plaintiffs were parties.

D. Granting such other and further relief as the Court may deem just and proper.

LET the defendants further show cause why, upon the return of this motion, a temporary restraining order should not be made in open court:

A. Restraining the Commissioner of Sanitation, pending the determination of this motion, from continuing the suspension of the individual plaintiffs and from conducting any hearing upon charges based upon their assertion of their constitutional privilege against self-incrimination, or upon any information obtained as a result of intercepting and divulging of any telephone conversations to which any of the plaintiffs were parties.

B. Enjoining the Commissioner of Investigation, pending the determination of this motion, from intercepting or divulging the contents of any conversations to which any of the plaintiffs were or may be parties.

Sufficient reason appearing therefor, service of this order and the papers upon which it is based upon each of the defendants, by leaving a copy thereof with the persons in charge of each of their offices, on or before the 15th day of December, 1966, shall be deemed good and sufficient service.

Dated: December 14, 1966.

EDMUND L. PALMIERI,
U. S. D. J

**Affidavit of John J. De Lury, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN J. DE LURY, being duly sworn, deposes and says:

1. I am the President of Uniformed Sanitation Men Association, Inc., a labor union incorporated under the laws of the State of New York and known generally as Uniformed Sanitationmen's Association, Local 831, IBT.
2. The Union is the collective bargaining agent of the sanitationmen employed by the Department of Sanitation of the City of New York, numbering approximately 10,000, and was certified as such on August 5, 1958 by the Commissioner of Labor of the City of New York.
3. In November 1965 the Union entered into a collective bargaining agreement with the City of New York on behalf of the said employees, establishing their terms and conditions of employment effective July 1, 1965. A copy of the said agreement, which is presently in effect, is annexed hereto as Exhibit A.
4. As collective bargaining agent, the Union represents the eleven individual plaintiffs named in paragraph

Affidavit of John J. De Lury

4 of the complaint, all of whom are sanitationmen employed in the Department of Sanitation for periods ranging from thirteen to thirty-six years. These men are members of the Union with tenure as civil service employees under the State Civil Service Law; most of them are war veterans with honorable discharges from the United States Army; all of them are married and many have children dependent upon them for support; none of them, so far as I am aware, has ever been convicted for crime.

5. The five individual plaintiffs named in paragraph 5 of the complaint include one foreman and four assistant foremen. They have been employed in the Department of Sanitation by the City of New York for periods ranging from sixteen to thirty-six years. Each of them, too, has tenure under the State Civil Service Law; several are war veterans with honorable discharges, as appears from the complaint; all of them are married and have families dependent for support upon them; none of them, so far as I know, has any criminal record. The Union is directly concerned with their welfare and with their constitutional rights since these rights have been violated in the course of the same investigation and in precisely the same manner as the Union members involved in this action.

6. On November 22, 23 and 28, 1966, the Commissioner of Investigation of the City of New York directed all of the individual plaintiffs to appear before him, put them under oath, and interrogated them, as appears in the annexed affidavits of these plaintiff employees. The Commissioner indicated to several of them that he had recordings of their telephone conversations; in a number of instances he played back to them tapes of their alleged telephone conversations with one another and with other persons. I am advised by counsel and believe that this was a violation of § 605 of the Federal Communications Act of 1934.

Affidavit of John J. De Lury

7. It further appears from the annexed affidavits that twelve of the individual plaintiff employees declined to answer a number of questions on the ground of their constitutional privilege against self-incrimination which, I am advised, is guaranteed to them by the Fifth and Fourteenth Amendments to the Constitution of the United States. I am further advised that four plaintiff employees did answer questions, as appears from their affidavits, although I have reason to believe that one of them, John Alessio, who has a record of psychological illness, did not understand what was happening at the time of the hearing before the Commissioner.

8. Following the hearings and on December 2, 1966 or shortly thereafter, each of the individual plaintiff employees was notified by the Commissioner of Sanitation that he was suspended from his employment without pay as a result of the hearings before the Commissioner of Investigation. The letter of notification which was sent to twelve employees explicitly stated that the suspension was pursuant to § 1123 of the New York City Charter and was because

"you invoked your constitutional privilege against self-incrimination and refused to answer any questions relating to your duties and employment in the Department of Sanitation on the ground that the answers thereto would tend to incriminate you."

The letter was in the form attached to the affidavit of Joseph Miranda, one of the plaintiff employees.

9. The remaining four employees, those who did not assert their constitutional privilege, were suspended upon the basis of

Affidavit of John J. De Lury

"information received from the Commissioner of Investigation concerning irregularities out of your employment in the Department of Sanitation."

A copy of the letter sent to those plaintiff employees is annexed to the affidavit of Anthony Calebrese.

10. I am advised and believe that the suspension of each one of the individual plaintiff employees is unlawful because, as appears above, it was the result of an investigation by the Commissioner of Investigation based upon and accompanied by the interception and divulging of telephone conversations by the said Commissioner and his agents, all in violation of § 605 of the Federal Communications Act of 1934. It may be that such interception and divulging may also have been in violation of the laws of the State of New York, but that is a matter which will have to be determined through depositions or at a hearing.

11. It also appears that with respect to twelve individual plaintiff employees, the suspensions are unlawful because they are concededly predicated upon the assertion of the individuals' constitutional privilege against self-incrimination which, I am advised, is guaranteed them by the Fifth and Fourteenth Amendments to the United States Constitution.

12. The injury to the individual plaintiffs is substantial and irreparable. After long employment, decades in some cases, in the only field in which they are experienced, they are now cast off, without work and without the wages which they need to support their families. Their pension, retirement, medical and hospitalization benefits are all in jeopardy; indeed, in the event of hospitalization, and one such instance has just arisen, the termination of payroll deductions has now resulted in termination of medical

Affidavit of John J. De Lury

and hospitalization coverage. This is a severe blow for a working man.

13. Nor is it realistic to assume that they can go out and easily secure other employment. The plaintiffs are now under a cloud in view of the widespread publicity that was given to their suspension by the defendants. A typical story is the story on page 1 of the New York Times of December 3, 1966, a copy of which is annexed hereto as Exhibit B.

14. This publicity, whose propriety I seriously question, as well as the letters of suspension stigmatizes the individual plaintiff employees as persons who invoked their privilege against self-incrimination and who have been charged with "irregularities" in their employment.

15. I am advised that it is the intention of the Commissioner of Sanitation to conduct hearings upon charges shortly to be served upon each of the individual plaintiffs. I am further advised that the hearings in the cases of those who asserted their constitutional privilege against self-incrimination will be predicated upon the assertion of that privilege, and in the cases of the other individual plaintiffs, the Commissioner of Sanitation intends to conduct a hearing for the purpose of establishing "irregularities."

16. The hearings in the cases involving the assertion of the privilege against self-incrimination are necessarily pro forma hearings in view of the fact that § 1123 of the New York City Charter provides for the automatic dismissal from employment of city employees who invoke that privilege. I am advised, that the predecessor section of the New York City Charter, § 903, which is in substantially identical language, has been construed author-

Affidavit of John J. De Lury

itatively by the Courts of Appeals of the State of New York to mean that the position of a city employee is vacated immediately and automatically upon the invocation of the privilege. Since the individual plaintiff employees do not deny that they asserted their constitutional privilege against self-incrimination, there is nothing to be tried in any subsequent hearings before the Commissioner of Sanitation.

17. The situation with respect to those plaintiff employees who did not assert the privilege is somewhat different. The investigation, the suspensions and the prospective hearings, and the possible dismissal from employment are clearly predicated upon information obtained by widespread wiretapping in violation of both the federal statute and the United States Constitution. If, as is claimed, plaintiffs' rights have been violated, then the investigation, the suspensions and the hearings are unlawful.

18. There is no administrative remedy available to the plaintiffs in this action. Those persons who asserted the constitutional privilege are automatically barred by § 1123 of the Charter, and the Commissioner of Sanitation does not have the power to rewrite the New York City Charter. Likewise, if as it claimed, the wiretapping of the individual plaintiffs' telephone conversations was a violation of the federal statute and Constitution, then the only remedy lies in this action.

19. The individual plaintiffs have suffered and will continue to suffer substantial and irreparable injury. The issues, at least with respect to the constitutional privilege, are exclusively those of law, and the same is apparently true with respect to the wiretapping issue. The plaintiffs therefore seek a preliminary injunction against the con-

Affidavit of John J. De Lury

tinuance of the suspensions for the assertion of the privilege and the continuance of any suspensions based upon illegal wiretapping. The plaintiffs also seek a preliminary injunction against administrative hearings and any disciplinary action based upon such violations of law by defendants.

20. The plaintiffs will also need a temporary restraining order against the unlawful activities described in the event that the motion for a preliminary injunction is not decided at the time of oral argument.

21. The second part of the relief sought upon the instant motion is an order directing the defendants to appear for oral examination under Rule 30 of the Federal Rules of Civil Procedure to testify with respect to the two issues in this case: (a) the assertion of the constitutional privilege; and (b) the wiretapping. These matters are directly material to the issue raised by the complaint and it is important for the plaintiffs to establish the details, the mechanics and the substance of the wiretapping for the purpose of establishing not only the violations of law, but for the purpose of showing the connection between those violations of law and the investigation, suspension and potential dismissals from employment of the individual plaintiffs.

22. The plaintiffs also seek an order requiring the defendants to produce and permit the inspection, copying and reproducing of the recordings or transcripts thereof of the telephone conversations of the individual plaintiffs, of the transcripts of the hearings by the Commissioner of Investigation, and all communications between the Commissioner of Investigation and other persons concerning these subjects.

Affidavit of John J. De Lury

23. The transcripts of the hearings were requested by the Union's counsel, Leonard B. Boudin, Esq. of Rabinowitz & Boudin, who were retained by the Union to institute this litigation. Copies of Mr. Boudin's letters to the Commissioner of Investigation and to the Commissioner of Sanitation are annexed hereto as Exhibits C and D. I am advised by Mr. Boudin that he talked to both Commissioners Kearing and Fraiman, and that their position is best reflected in the letter of Commissioner Fraiman to Mr. Boudin, a copy of which is annexed hereto as Exhibit E, in which the immediate delivery of the transcripts was refused but in which it was promised that certain of them would be delivered to some of the plaintiff employees upon the receipt of charges and notice of hearing upon those charges from the Commissioner of Sanitation.

24. This motion is brought on by order to show cause because it is necessary to take swift action to protect the rights of these plaintiff employees. There is a need to take the depositions quickly in order to ventilate all of the relevant facts necessary for the prosecution of this action and because further prejudicial administrative action by defendants is likely to be imminent.

25. An order to show cause is also necessary because the plaintiffs require an order at the present time directing the defendants to produce the documents and recordings for use upon the motion for a preliminary injunction and for use upon the application for a temporary restraining order.

26. No prior application for this relief has been made to any court or to any judge.

/s/ JOHN J. DE LURY

(Sworn to December 14, 1966.)

Exhibit A, Annexed to Foregoing Affidavit

THIS INDENTURE made the day of November 1965 between the City of New York, hereinafter referred to as the "First Party", and the undersigned, all Sanitation Men, employed in the Department of Sanitation, City of New York hereinafter referred to as the "Second Party".

WITNESSETH :

WHEREAS, The First Party was and still is a municipal corporation organized under the Laws of the State of New York, and

WHEREAS, the Second Parties were and still are employed by the First Party under the title of Sanitation Man, and

WHEREAS, certain differences between the parties have arisen with respect to rates of wages and other perquisites in the locality of the City of New York; and

WHEREAS, it is the desire of the parties herein to compromise their differences by the acceptance of certain annual or daily rates of pay and perquisites to be paid to the Second Parties both retroactively and prospectively for the affected period in full settlement of services rendered and to be rendered;

Now, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

1. The First Party agrees to employ each of the Second Parties signatory to this agreement for the period between July 1, 1965 and June 30, 1966 for 261 (8 hour) working days at the respective annual compensations set forth in Schedule "A" attached hereto.

2. It is hereby agreed, that annual salary adjustments as enumerated in Schedule "A" attached hereto shall ac-

Exhibit A

arue from the date of appointment or reinstatement of each of the Second Parties and shall be payable on the regular first pay period following the annual anniversary date of such appointment or reinstatement.

3. The First Party also agrees to compensate any of the Second Parties signatory to this agreement for the period as indicated between July 1, 1965 and June 30, 1966, for services rendered and to be rendered as follows:

EFFECTIVE JULY 1, 1965

a. *Sunday Work*—to be paid for at time and one-half ($1\frac{1}{2}$) the respective pro-rated daily rate.

b. *Snow Removal Activities*—in accordance with the respective budget certificates relating thereto; it being understood that, should any of the Second Parties be required to report for legal emergencies and/or snow work, on other than his regularly scheduled tours, he shall be guaranteed and paid a minimum of eight (8) hours pay at time and one-half ($1\frac{1}{2}$) the pro-rated daily rate if he reports for such work.

c. *Holiday Work*—in addition to the compensations referred to in paragraph "1" and Schedule "A" herein, the First Party hereby also agrees to provide additional payment to each signatory Second Party of one and one-half ($1\frac{1}{2}$) days pay for each (8 hour) day actually worked by him on the following holidays:

New Year's Day
Lincoln's Birthday
Washington's Birthday
Decoration Day
Independence Day

Labor Day
Columbus Day
Election Day
Veterans' Day
Thanksgiving Day
Christmas Day

Exhibit A

d. *Night Differential*—in addition to all other compensations referred to in paragraph "1" and Schedule "A" herein, the First Party agrees to pay to each affected Second Party the sum not to exceed \$1.00 per night when required actually to work a night shift. For these purposes a night shift shall be any shift in which four (4) or more hours of the shift fall after 3:00 P.M., except, that work performed on snow removal for which additional compensation is provided in accordance with paragraph 3.b above and for which additional compensation is also provided in accordance with paragraphs 3.a and 3.c above, and all other excused or unexcused absences with or without pay shall be excluded from this provision.

e. *Benefits Fund*—the First Party further agrees during the term of this agreement to provide a sum not to exceed an annual amount of \$159 for each incumbent Second Party, or the pro-rata share thereof, for each Second Party employed as a Sanitation Man during the term of this agreement for a period less than the full term of this agreement, for the purpose of furnishing, as provided in the annexed agreement hereinafter referred to, certain supplementary benefits for the period of employment of such signatory by the City during the term of this agreement as defined in the annexed separate agreement entered into between the City of New York and the Uniformed Sanitationmen's Association. The payments as above indicated shall be remitted by the First Party to the Uniformed Sanitationmen's Association Security Benefits Fund subject to the annexed separate agreement entered into between the City of New York and the Uniformed Sanitationmen's Association for the benefit of each incumbent Second

Exhibit A

Party signatory to this agreement and further subject to periodic audit by the Comptroller of the City of New York.

f. *Hospitalization Coverage*—The First Party hereby further agrees, effective July 1, 1965 through December 31, 1965 to the continued assumption by the First Party of the total payment for hospital insurance only, on a category basis, for each signatory Second Party for such or equivalent hospitalization coverage only as is currently provided by the First Party under HIP-Blue Cross (21-day Plan) category basis.

In addition, thereto, the First Party further agrees effective July 1, 1965 through December 31, 1965 to continue to provide payment for hospitalization coverage as above indicated for each signatory Second Party, who may retire on or after January 1, 1965, with the following provisos:

a—That this hospitalization coverage shall be applicable to the retiree on a category basis at the time of his retirement and shall be limited to only those dependents covered at the time of his retirement.

b—That this hospitalization coverage shall be applicable only if the retiree is not otherwise gainfully employed on a more than half-time basis.

c—That this hospitalization coverage shall not be applicable if the retiree is in any way otherwise covered by similar hospitalization insurance after retirement.

EFFECTIVE JANUARY 1, 1966

g. *Health and Hospitalization Coverage*—The First Party hereby further agrees, effective January 1, 1966, to the assumption by the First Party of full payment for choice of health and hospital in-

Exhibit A

surance, not to exceed 100% of the full cost of HIP-Blue Cross (21-day Plan), on a category basis, for each signatory Second Party.

In addition thereto, the First Party further agrees, effective January 1, 1966 to provide payment for health and hospitalization coverage as above indicated for each Second Party, who may retire on or after January 1, 1965, with the following provisos:

a—That this health and hospitalization coverage shall be applicable to the retiree on a category basis at the time of his retirement and shall be limited to only those dependents covered at the time of his retirement.

b—That this health and hospitalization coverage shall be applicable only if the retiree is not otherwise gainfully employed on a more than half-time basis.

c—That this health and hospitalization coverage shall not be applicable if the retiree is in any way otherwise covered by similar health and hospitalization insurance after retirement.

4. The First Party agrees to provide to each of the Second Parties signatory to this agreement, a uniform allowance as indicated in Schedule "A" attached hereto and pursuant to provisions of the appropriate certificate of the Budget Director in addition to all other allowances hereinbefore provided.

5. It is also understood and agreed that the terms and conditions of employment of each of the Second Parties, in addition to the annual compensations and other perquisites referred to in paragraphs "1" to "4" and Schedule "A" inclusive hereof, shall include pension, sick leave and vacation with pay benefits (each more fully described below).

Exhibit A

It is also agreed, that sick leave and/or line of duty injury benefits shall be granted to signatories of this agreement, in accordance with Chapter 551 of the Laws of 1962 (New York State).

The First Party further agrees to grant to each signatory Second Party an annual vacation allowance of 25 days, and continue to grant terminal leave of one (1) month for every ten (10) years of service prior to retirement.

It is further understood and agreed between the parties herein that such working conditions and other perquisites not specifically enumerated herein shall be in conformity with a memorandum of understanding covering such working conditions and perquisites agreed to between the Department of Sanitation and the duly designated Union, the Uniformed Sanitationmen's Association, as representatives of the Second Parties as certified by the Commissioner of Labor of the City of New York.

6. It is further understood and agreed between the parties herein that the pension adjustment to provide for the increased take home pay provided for by the terms of Executive Order No. 146 dated June 18, 1965 shall be continued for each of the Second Parties signatory to this agreement, effective July 1, 1965.

7. Simultaneously with the approval of the terms and conditions of this agreement by the Mayor of the City of New York, each of the Second Parties hereby agrees to execute and deliver to the City of New York his general release.

EFFECTIVE JANUARY 1, 1966

g. Health and Hospitalization Coverage—The First Party hereby further agrees, effective January 1, 1966, to the assumption by the First Party of

Exhibit A

full payment for choice of health and hospital insurance, not to exceed 100% of the full cost of HIP-Blue Cross (21-day Plan), on a category basis, for each signatory Second Party.

In addition thereto, the First Party further agrees, effective January 1, 1966 to provide payment for health and hospitalization coverage as above indicated for each Second Party, who may retire on or after January 1, 1965, with the following provisos:

a—That this health and hospitalization coverage shall be applicable to the retiree on a category basis at the time of his retirement and shall be limited to only those dependents covered at the time of his retirement.

b—That this health and hospitalization coverage shall be applicable only if the retiree is not otherwise gainfully employed on a more than half-time basis.

c—That this health and hospitalization coverage shall not be applicable if the retiree is in any way otherwise covered by similar health and hospitalization insurance after retirement.

4. The First Party agrees to provide to each of the Second Parties signatory to this agreement, a uniform allowance as indicated in Schedule "A" attached hereto and pursuant to provisions of the appropriate certificate of the Budget Director in addition to all other allowances hereinbefore provided.

5. It is also understood and agreed that the terms and conditions of employment of each of the Second Parties, in addition to the annual compensations and other per-

Exhibit A

quisites referred to in paragraphs "1" to "4" and Schedule "A" inclusive hereof, shall include pension, sick leave and vacation with pay benefits (each more fully described below).

It is also agreed, that sick leave and/or line of duty injury benefits shall be granted to signatories of this agreement, in accordance with Chapter 551 of the Laws of 1962 (New York State).

The First Party further agrees to grant to each signatory Second Party an annual vacation allowance of 25 days, and continue to grant terminal leave of one (1) month for every ten (10) years of service prior to retirement.

It is further understood and agreed between the parties herein that such working conditions and other perquisites not specifically enumerated herein shall be in conformity with a memorandum of understanding covering such working conditions and perquisites agreed to between the Department of Sanitation and the duly designated Union, the Uniformed Sanitationmen's Association, as representatives of the Second Parties as certified by the Commissioner of Labor of the City of New York.

6. It is further understood and agreed between the parties herein that the pension adjustment to provide for the increased take home pay provided for by the terms of Executive Order No. 146 dated June 18, 1965 shall be continued for each of the Second Parties signatory to this agreement, effective July 1, 1965.

7. Simultaneously with the approval of the terms and conditions of this agreement by the Mayor of the City of New York, each of the Second Parties hereby agrees to execute and deliver to the City of New York his general release.

Exhibit A

8. The rates and other perquisites referred to in this agreement are not to be construed as rate fixations of prevailing wages under Section 220 of the Labor Law, the same having been agreed upon in compromise for the purpose of effectuating the settlement of disputes between the parties herein.

9. Upon execution and approval of this agreement, each of the Second Parties agrees to:

a—Withdraw any and all of his claims and complaints, if any, heretofore filed under Section 220 of the Labor Law;

b—refrain from filing similar claims or complaints, for the period from July 1, 1965 to June 30, 1966; and

c—waive his rights to receive prevailing rates of wages in proceedings either initiated or which hereafter may be initiated under the Labor Law during the effective period of this agreement;

d—discontinue any and all actions and/or Article 78 proceedings in any court heretofore commenced by him or on his behalf;

e—waive any and all rights and remedies with respect to wage supplements now provided by Chapter 750 of the Laws of 1956 except as herein otherwise provided, for the effective period of this agreement.

10. The terms and conditions of this agreement shall be subject to approval of the Mayor of the City of New York.

Exhibit A

otherwise the same shall be of no force and effect whatever.

THE CITY OF NEW YORK

By:

Budget Director, First Party

.....

Second Party

.....

Second Party

(SCHEDULE "A" 1965-1966)**SANITATION MAN**

Annual Rate on June 30, 1965 Prior to Revision	July 1, 1965 Min.—\$5,974 Max.—\$7,506	Anniversary Date after July 1, 1965	Salary Adjustment
\$5,544	\$5,974	\$6,485	\$511
5,642	6,072	6,583	511
6,055	6,485	6,996	511
6,437	6,867	7,378	511
6,566	6,996	7,506	510
7,076	7,506	—	—

Annual Uniform Allowance = \$115

Appointed on or after July 1, 1965

Appointment Rate	\$5,974	—
After one year service	6,485	511
After two year service	6,996	511
After three year service	7,506	510

Exhibit B, Annexed to Foregoing Affidavit**NEW YORK TIMES****SATURDAY, DECEMBER 3, 1966****18 EMPLOYEES SUSPENDED IN NEW
SANITATION SCANDAL****By ROBERT E. DALLOS**

The Sanitation Department suspended 18 employees yesterday in the second scandal uncovered in the department in less than two months. Investigation Commissioner Arnold G. Fraiman said the men had split up to \$500 a day in cash payments from private companies who dumped garbage at the city-owned East 91st Street Marine Transfer Station. The scheme, he said, cost the city \$350,000 a year and had been going on since 1949.

Private companies are supposed to buy tickets from the Sanitation Department to turn in when they dump commercial refuse at any of 24 city facilities.

Mr. Fraiman said the men—the 91st Street station's entire crew—often accepted half the charge for a load in cash instead of taking the full charge in tickets. That way the companies saved money on their dumping costs and the employees pocketed the cash, he said.

PROSECUTOR TO GET DATA

Mr. Fraiman said the results of the investigation, which began in September, would be turned over to the district attorney for possible criminal prosecution.

The carting companies, Mr. Fraiman said, could be charged with "perhaps larceny" in any illegal payment of fees to city employees. Any charges against the employer would be up to the district attorney, he added.

Exhibit B

John J. DeLury, president of the Uniformed Sanitationmen's Association, said the charge that the alleged practice dated back to 1949 was "a lot of malarkey." He put the blame for the scandal on what he said were Mayor Lindsay's "incredibly inept appointments" of key officials of the department.

Mr. DeLury ordered the department's 10,000 union members to refuse to handle unsafe equipment and to observe all safety rules and regulations.

The resulting "massive slow-down," which the union president said would begin to cause a backlog of garbage collections by Monday, "was motivated and related to" the city's action in the situation.

Mr. DeLury was also strongly critical of Thursday's appointment by Sanitation Commissioner Samuel J. Kearing Jr. of Edgar D. Croswell as the department's inspector general.

He called the appointment of the state police captain, who led the 1957 Apalachin raid against underworld leaders; a "slur on the Italian membership in the department."

The union leader said he had received telephone calls from his members and their wives protesting the appointment.

Noting that of the 14,000 sanitation men, about 85 per cent are of Italian descent, Mr. DeLury said: "Why bring Captain Croswell here to look for Mafia members in every [Department] district?"

KEARING'S EXPLANATION

In reply to Mr. DeLury's charges, Mr. Kearing said last night:

"I don't think that any nationality is more involved in crime than any other. Captain Croswell was not appointed simply because he was involved

Exhibit B

in the Apalachin raid. I was simply looking for the most professional and competent investigator with a solid police background that I could get."

But the commissioner, agreed with the union president that "we do have a large number of vehicles in need of repair and out of service; I share his concern for the welfare and safety of his men."

At his news conference yesterday, Mr. Fraiman sat next to Mr. Kearing.

The Investigation Commissioner said all but four of the 18 men had refused to answer any questions about the reported cash payments on grounds of self-incrimination. He said the 14 would be given a "pro forma" hearing by Mr. Kearing within 30 days and would then be automatically dismissed. He refused to identify which of the men had refused to answer questions. He also did not identify the carting companies.

The highest ranking of those suspended was foreman Bernard F. Bellettiere of 414 Avenue C, Brooklyn, who joined the department in 1948. He is 44 years old and gets \$9,095 a year.

2 IN INVESTIGATION UNIT

Two of the suspended men, according to Mr. Fraiman, were members of the department's investigation unit assigned to the 91st Street station.

They are Frank G. Casale, 48, of 873 68th Street, Brooklyn, and Joseph Moschella, 40 of 666 Carroll Street, Brooklyn. Mr. Casale joined the department in 1949 and Mr. Moschella in 1952. Both draw the \$7,506 salary of the sanitation man rating.

Mr. Fraiman said that besides often paying for half the cost of the refuse dumping, which normally cost between \$6 and \$28 depending on the size of the truck, the

Exhibit B

private carting companies were also allowed to dump their refuse when the station was closed to others.

A Sanitation Department official said yesterday that during 1965 the city received \$4,893,360 from the sale of 20,824 dumping-ticket books. The city operates 11 incinerators, nine marine transfer stations and six landfills, all but two of which are open for dumping by private companies.

At the 91st Street Station, garbage is dumped directly onto barges for transfer to landfill areas.

Mr. Fraiman said there was no evidence that similar payoffs to sanitation employees were being made at any other dumping stations. The current investigation, he said, was started after information was supplied to him by License Commissioner Joel J. Tyler.

In answer to a question, Mr. Fraiman declined to criticize the administration of former Mayor Robert F. Wagner for not having uncovered alleged long-standing irregularities in the Sanitation Department. Mr. Wagner could not be reached for comment last night.

At a news conference shortly after the Fraiman disclosures, Mayor Lindsay said that reports of a racket in dumping had been submitted to Mr. Wagner when he was Mayor. "But there is a big difference," Mr. Lindsay said, "between receiving reports of allegations and the commissioner's being able to prove them out, make arrests and report to the district attorney."

The Mayor added that he thought the only reason the alleged racket had not been "rooted out" earlier was lack of proof. "Around September," he said, "we got lucky and got the proof."

Mr. Fraiman said there was no connection between yesterday's charges and those made in October that more than 30 employees had paid \$500 to \$1,000 for promotions they had earned through Civil Service examinations. As

Exhibit B

a result of that inquiry, First Deputy Commissioner Vincent A. Starace was dismissed from the Sanitation Department.

Mr. Kearing assumed the \$30,000-a-year commissioner-ship when Joseph P. Periconi resigned last month.

Assistant Foreman Anthony D'Ambrosio, 56, of 104-14 130th St., Richmond Hill, Queens.

August M. Mascia, 50, of 155-03 Jewel Ave., Flushing, Queens.

Leonard Monteleone, 52, 1673 Woodbine St., Ridgewood.

Joseph M. Barbara, 59, of 445 54th St., Brooklyn.

Also Sanitation men John L. Alessio, 40, of Tenafly Court, Tenafly, N.J.

Anthony Calabrese, 58, of 331 E. 146th St.

Nicholas J. Caruso, 54, of 164-39 76th Ave., Flushing, Queens.

Nunzio Chierico, 46, of 203 St. Nicholas Ave., Brooklyn.

Philip D'Agostino, 51, of 137 Greaves Ave., Staten Island.

Marcus F. King, 41, of 499 Vermont St., Brooklyn.

Peter I. Lombardo, 43, of 2724 Coyle St., Brooklyn.

Michael A. Mango, 45, of 339 Pennyfield Ave., Bronx.

James Minter, 45, of 56-36 Waldron St., Corona, Queens.

Joseph Miranda, 42, of 209-40 41st Ave., Bayside, Queens.

Anselmo Quinones, 45, of 1602 Undercliff Ave., The Bronx.

Exhibit C, Annexed to Foregoing Affidavit

December 7, 1966

Hon. Arnold G. Fraiman
Commissioner of Investigation
111 John Street
New York, New York

Dear Mr. Fraiman:

I represent the Uniformed Sanitationmen's Association, certain of its members and several other employees of the Department of Sanitation who were suspended on December 2 and December 6, 1966 on the ground, in most instances, that they had invoked their constitutional privilege against self-incrimination in hearings conducted by you.

In order adequately to protect their rights, it is necessary that the transcripts of those hearings be made available to me. I am advised by Mr. Morris Weissberg, who represented many of these employees at the hearings before you, that he requested the transcripts of you, and that you declined to deliver them to him.

I shall appreciate it if you would reconsider this matter and deliver these transcripts of the hearings to me in accordance with the enclosed authorization. I am sure that you will appreciate the materiality of these transcripts since your report of the hearings to the Commissioner of Sanitation was the basis for the suspensions.

I shall appreciate your telephoning me upon the receipt of this letter.

Sincerely yours,

LEONARD B. BOUDIN

LBB:ts

Enc.

BY CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Exhibit D, Annexed to Foregoing Affidavit

December 7, 1966

Hon. Samuel J. Kearing, Jr.
Commissioner of Sanitation
Department of Sanitation
125 Worth Street
New York, New York 10013

Dear Mr. Kearing:

As you may know, this office has been retained by the Uniformed Sanitationmen's Association to represent the union's members who were suspended from their employment by you pursuant to letters dated December 2 and December 6, 1966 by reason of the invocation of their constitutional privilege against self-incrimination. This office accordingly represents both the union members and other employees whose names appear in the enclosed letter of authorization.

I am advised that the transcripts of the hearings conducted before the Commissioner of Investigation are still in his possession, and that he has thus far declined to make them available to Morris Weissberg, Esq., who represented many of these employees at the hearings. I have written to Mr. Fraiman requesting that these transcripts be given to me.

Independently of that request, I now request that you deliver to me those transcripts which are in your possession. If they are not presently in your possession, I presume that the transcripts will be made available to you by Mr. Fraiman upon demand. In such case, may I request that you do secure those transcripts immediately and make them available to me.

I would appreciate your telephoning me upon receipt of this letter.

Sincerely yours,

LEONARD B. BOUDIN

LBB:ts

By CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Exhibit E, Annexed to Foregoing Affidavit

**CITY OF NEW YORK
DEPARTMENT OF INVESTIGATION
111 John Street
New York, N. Y. 10038
COrtlandt 7-6000**

**In Reply Please
Refer to
5425/66**

December 8, 1966

**Leonard B. Boudin, Esq.
Messrs. Rabinowitz & Boudin
30 East 42nd Street
New York, N. Y. 10017**

Dear Mr. Boudin:

Thank you for your letter of December 7 in which you request that I furnish you with copies of the transcripts of the 16 suspended employees of the Department of Sanitation whom you represent. The transcripts which you request were of private hearings conducted by this Department pursuant to Chapter 34 of the New York City Charter.

It is the policy of this office not to make such transcripts available, either to witnesses or their attorneys. However, in view of the fact that 13 of your clients will be charged with refusing to answer questions put to them by this Department, I shall be pleased to make copies of their transcripts available to you when such charges are served. It is anticipated that this will be some time next week. With respect to the remaining three men, I cannot state whether copies of their transcripts will be made available until the specific nature of the charges against them are finally determined.

Very truly yours,

**ARNOLD GUY. FRAMAN
Commissioner**

**Affidavit of Leonard Monteleone, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEONARD MONTELEONE, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action. I am an assistant foreman in the Department of Sanitation and have been employed by the Department for 24 years. I am in the classified civil service of the State of New York and am a veteran of the second World War.

I am married and have four children.

2. On or about November 24, 1966 I was instructed by the Department of Investigation to appear at its offices, I did so, and was interrogated by Commissioner Fraiman. The Commissioner played tape recordings of telephone conversations in which he said I had participated.

3. On December 2, 1966 I received a telephone call from Superintendent Beers of the Department of Sanitation advising me that I was suspended from duty without pay.

4. On December 6, 1966, Commissioner of Sanitation, Samuel J. Kearing, Jr. wrote me confirming the suspension because of "information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation".

LEONARD MONTELEONE

(Sworn to December 8, 1966.)

**Affidavit of August Mascia, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

AUGUST MASCIA, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am an Assistant Foreman in the Department of Sanitation and have been employed by the Department for 22 years. I am a Civil Service employee on the Classified list and am an honorably discharged veteran.

On November 28, 1966, a representative of the New York City, Department of Investigation appeared at my house and asked me to accompany him to a meeting with the Commissioner of Investigation, Arnold G. Fraiman. When I met with Mr. Fraiman that day he asked me several questions, all of which I answered. At that point I said I wouldn't answer any further questions before seeing an attorney. Later that day I contacted my attorney, Leo Cirabisi, Esq., who in turn phoned Mr. Fraiman and scheduled an appointment for the following morning.

On November 29, 1966, I accompanied my attorney to the scheduled meeting with Mr. Fraiman. My attorney began by asking Mr. Fraiman what the charges were against me. Mr. Fraiman explained that I was taking money from private contractors instead of tickets which they had purchased from the City. Mr. Fraiman said he had proof of this in the form of a recorded telephone con-

Affidavit of August Mascia

versation. Then Mr. Fraiman proceeded to question me as he had the preceding day as to whether I knew a Frank Perna. I answered that I did not know him, at which point Mr. Fraiman played a tape recording of a telephone conversation purportedly between myself and Mr. Perna.

I then consulted my attorney and upon his advice, decided not to answer any further questions and to invoke my constitutional privilege against self-incrimination. My attorney informed Mr. Fraiman of this decision.

The Commissioner then called in a stenographer and put me under oath. I stated my name and address. After Mr. Fraiman asked me four other questions, each of which I answered by asserting my constitutional privilege, my attorney stated for the record that I was being "hounded and badgered".

Thereafter, I received a letter dated December 2, 1966, from the Commissioner of Sanitation, Samuel J. Kearing, Jr., which advised me that I was suspended from my employment without pay, effective immediately, because I had invoked my constitutional privilege against self-incrimination. The letter was the same in substance as that sent to Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

AUGUSTA MASCIA.

(Sworn to December 9, 1966.)

**Affidavit of Joseph Miranda, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss. :

JOSEPH MIRANDA, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I have been employed by the Department of Sanitation for 13½ years and have been employed, more particularly, at the 91st Street location since July 1966. I am an honorably discharged veteran and am a Civil Service employee on the Classified list.

On November 22, 1966, I was called to the office of Arnold G. Fraiman, Commissioner of Investigation, without legal counsel. When I appeared on that date, Mr. Fraiman played a series of tape recordings which he suggested was a tape recording of a telephone conversation between myself and other persons.

Thereafter, on November 23, 1966, I appeared at the office of the Commissioner of Investigation with Morris Weissberg, Esq., my legal counsel. Mr. Fraiman called in a stenographer and placed me under oath. He then asked me a number of questions which I declined to answer on the ground of my constitutional privilege against self-incrimination.

Thereafter, on December 2, 1966, I received a letter bearing that date from Samuel J. Kearing, Jr., Commissioner of Sanitation, which is annexed hereto as Exhibit A. That

Exhibit A

letter stated that because I invoked my constitutional privilege against self-incrimination at the hearing before the Commissioner of Investigation, I was suspended without pay, from my position, effective immediately.

JOSEPH MIRANDA

(Sworn to December 8, 1966.)

Exhibit A. Annexed to Foregoing Affidavit

THE CITY OF NEW YORK
DEPARTMENT OF SANITATION
125 Worth Street
New York, N. Y. 10013

December 2, 1966

Mr. Joseph Miranda
209-40 41st Avenue
Bayside, N. Y.

Dear Mr. Miranda:

The Commissioner of Investigation has informed me that in a Private Hearing, conducted pursuant to Chapter 34 of the New York City Charter, at the Department of Investigation on November 23, 1966, you invoked your Constitutional privilege against self-incrimination and refused to answer any questions relating to your duties and employment with the Department of Sanitation on the ground that the answers thereto would tend to incriminate you.

This is to inform you that for the foregoing reasons and pursuant to Section 1123 of the Charter, you are hereby suspended, without pay, from your position of Sanitation Man in the Department of Sanitation, effective immediately.

Very truly yours,

SAMUEL J. KEARING, JR.,
Commissioner of Sanitation

SJK-tf

**Affidavit of Nunzio Chierico, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NUNZIO CHIERICO, being duly sworn, deposes and says:
I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man and have been employed by the Department of Sanitation for 13 years. I am a member of the Classified Civil Service, and am stationed currently at the 91st Street location.

I am a member of the plaintiff Uniformed Sanitation Men Association, Inc., also known as Uniformed Sanitation Men Association, Local 831, IBT (Ind.).

On November 23, 1966, I was called down to the office of Arnold G. Fraiman, Commissioner of Investigation, and was asked certain questions under oath. Mr. Fraiman told me that he had records of telephone conversations and movies, but neither played the tapes nor showed me the movies.

After asking me one or two questions, I was discharged and thereafter on the same day returned to Mr. Fraiman's office, at his instructions, with my attorney, Morris Weissberg, Esq.

I was put under oath, and then asked various questions by Mr. Fraiman. I declined to answer a number of those questions on the ground of my constitutional privilege against self-incrimination.

Affidavit of Bernard F. Bellettiere

Thereafter, I received a letter dated December 2, 1966, from the Commissioner of Sanitation, Samuel J. Kearing, Jr., that I had been suspended without pay, effective immediately, by reason of my assertion of the constitutional privilege against self-incrimination. The letter was in substantially the same form as that addressed to Joseph Miranda, which is attached to his affidavit of this date in support of this motion.

NUNZIO CHIERICO

(Sworn to December 8, 1966.)

**Affidavit of Bernard F. Bellettiere, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BERNARD F. BELLETTIERE, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action. I have been employed by the Department of Sanitation for the last 18 years and have the position of Foreman. I am stationed at the 91st Street location.

I am in the Classified Civil Service, and an honorably discharged veteran of World War II, receiving 10% permanent disability benefits.

Affidavit of Bernard F. Bellettiere

On November 22, 1966, I appeared at the office of the Department of Investigation, without legal counsel, and was interrogated by Commissioner Arnold G. Fraiman. Mr. Fraiman in the course of the interrogation played a series of tape recordings which he characterized as telephone conversations between myself and other fellow employees.

Mr. Fraiman called in a stenographer and put certain questions to me which I declined to answer on the basis of my constitutional privilege against self-incrimination.

Thereafter, by letter dated December 2, 1966, in form substantially similar to that addressed to Joseph Miranda, and attached to his affidavit submitted herewith, I was advised by Samuel J. Kearing, Jr., Commissioner of Sanitation, that I was suspended without pay, effective immediately, because "you invoked your constitutional privilege against self-incrimination and refused to answer any questions relating to your duties and employment with the Department of Sanitation on the ground that the answers thereto would tend to incriminate you".

BERNARD F. BELLETTIERE

(Sworn to December 8, 1966.)

**Affidavit of Nicholas J. Caruso, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NICHOLAS J. CARUSO, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I have been an employee of the Department of Sanitation for the last 17½ years and have been stationed at the 91st Street location for the last 10-11 years. I am a Civil Service employee on the Classified list.

On November 23, 1966, I appeared at the office of the Commissioner of Investigation, Arnold G. Fraiman, without legal counsel. When I appeared, Mr. Fraiman asked me a series of questions. I was then told to reappear with legal counsel and later in the same day I appeared with Morris Weissberg, Esq., my legal counsel.

I was placed under oath and asked a series of questions, a number of which I declined to answer on the ground of my constitutional privilege against self-incrimination.

Thereafter, I received a letter dated December 2, 1966, from the Commissioner of Sanitation, Samuel J. Kearing, Jr., that I had been suspended without pay, effective immediately by reason of my assertion of my constitutional privilege against self-incrimination. The letter was the same in substance as that sent to Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

NICHOLAS J. CARUSO.

(Sworn to December 8, 1966.)

**Affidavit of Anselmo Quinones, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANSELMO QUINONES, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man and have been employed by the Department of Sanitation for 14 years. I am a Civil Service employee on the Classified list and an honorably discharged veteran.

On November 28, 1966, I was taken by a representative of the Department of Investigation to the office of the Commissioner of Investigation, Arnold G. Fraiman. Before I was placed under oath, Mr. Fraiman played the tape of a telephone conversation purporting to be held between myself and a private cartman. Mr. Fraiman then asked me several questions. I told Mr. Fraiman that I was not involved in any wrong-doing which may be the subject of this investigation, and that I was too nervous to answer any further questions by myself and that I would have to get an attorney.

When I returned later that same day I was accompanied by my attorney, Morris Weissberg, Esq. and he asked Mr. Fraiman for a week's adjournment. Instead we got an adjournment until the following day.

On November 29, 1966, Mr. Weissberg and I returned to Mr. Fraiman's office at which time a stenographer was

Affidavit of Anselmo Quinones.

present and I was placed under oath. I was cautioned by Mr. Fraiman that if I refused to answer any questions with respect to my official conduct on the grounds of my privilege against self-incrimination, my employment would be terminated. Mr. Fraiman then went on to ask me three questions and to each one of these I refused to answer by asserting my constitutional privilege.

At some point during this hearing, Mr. Fraiman indicated to Mr. Weissberg that he had overhead telephone conversations to which I was a party.

Thereafter, on December 2, 1966, I received a letter from the Commissioner of Sanitation, Samuel J. Kearing, Jr., that I had been suspended without pay, effective immediately, by reason of my assertion of my constitutional privilege against self-incrimination. The letter is the same in substance as that sent to Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

ANSELMO QUINONES.

(Sworn to December 9, 1966.)

**Affidavit of Anthony Calabrese, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANTHONY CALABRESE, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man and have been employed by the Department of Sanitation for 36 years. I am a Civil Service employee on the Classified list.

On November 28, 1966, a representative of the Department of Investigation came to my home and asked me to accompany him to the Department's office. On arrival, I met Arnold G. Fraiman, Commissioner of Investigation. Mr. Fraiman played a tape recording of a telephone conversation which he said was between myself and other persons. I was then placed under oath and asked whether I wanted an attorney. I answered no. Mr. Fraiman then asked me a number of questions, all of which I answered.

I did not invoke my constitutional privilege against self-incrimination to any of the questions asked me.

Thereafter, on December 2, 1966, I received a letter bearing that date from Samuel J. Keating, Jr., Commissioner of Sanitation, a copy of which is attached hereto as Exhibit A. That letter stated that upon information received by the Commissioner of Investigation concerning irregularities arising out of my employment in the Department of Sanitation, I was suspended without pay from my position, effective immediately.

ANTHONY CALABRESE.

(Sworn to December 9, 1966.)

Exhibit A, Annexed to Foregoing Affidavit

THE CITY OF NEW YORK
DEPARTMENT OF SANITATION
125 Worth Street
New York, N. Y. 10013

December 6, 1966

Mr. Anthony Calabrese
331 East 146th Street
Bronx, N. Y. 10451

Dear Mr. Calabrese:

On December 2, 1966 Senior Superintendent David A. Beer, in charge of the Division of Marine Operations of the Bureau of Waste Disposal, following instructions from his superior and at my direction, advised you by telephone, that you were suspended without pay from your position of Sanitation Man, effective immediately.

This communication hereby confirms your suspension of Friday, December 2, 1966 which is based upon information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation.

Very truly yours,

SAMUEL J. KEARING, JR.
Commissioner of Sanitation

SJK-tp

**Affidavit of James D. Minter, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES D. MINTER, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man employed by the Department of Sanitation for 11 years. I am a Civil Service employee on the Classified list and am an honorably discharged veteran.

On November 23, 1966, I appeared at the office of the Commissioner of Investigation, Arnold G. Fraiman, without legal counsel. At this time Mr. Fraiman played a tape for me and then put me under oath and asked various questions. After telling him my name and address, I refused to answer any further questions without the presence of an attorney. I was then told by Mr. Fraiman to reappear with legal counsel. Later in the same day I appeared with Morris Weissberg, Esq., my legal counsel.

I was again placed under oath and upon advice of counsel, asserted my Fifth Amendment privilege against self-incrimination to each question asked me.

Thereafter, I received a letter dated December 2, 1966, from the Commissioner of Sanitation, Samuel J. Kearing, Jr., suspending me without pay, effective immediately, from my position in the Department of Sanitation, on the ground that I had invoked my constitutional privilege against self-incrimination. The letter was the same in

Affidavit of Marcus F. King

substance as that sent to Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

JAMES D. MINTER.

(Sworn to December 9, 1966.)

**Affidavit of Marcus F. King, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARCUS F. KING, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I have been employed by the Department of Sanitation for 16 years as a Sanitation Man. I am a Civil Service employee on the Classified list and an honorably discharged veteran.

On November 23, 1966, a representative of the Department of Investigation appeared at my house, and instructed me to report immediately to the Commissioner of Investigation.

When I appeared before the Commissioner, Arnold G. Fraiman, he began our conversation immediately by asking me about my dog. This was clearly a warning to me that my telephone conversations had been taped, since I had had telephone conversations referring to my dog. Mr. Fraiman did not tell me whether there were any charges against

Affidavit of Marcus F. King

me or what the subject of the investigation was. However, he did ask me to make a statement but I advised him that I would have to consult counsel. He instructed me to come down that afternoon with an attorney.

That afternoon of the same day, I returned to the Commissioner's office with Morris Weissberg, Esq. After I was put under oath, section 1123 of the New York City Charter was read to me and I was warned of the loss of my job if I refused to answer questions. Mr. Fraiman put a number of questions to me and after answering as to my name, address and how long I worked for the City, I declined to answer all further questions on the ground of my constitutional privilege against self-incrimination.

Thereafter, on December 2, 1966, I received a letter from the Commissioner of Sanitation, Samuel J. Kearing, Jr., advising me that I had been suspended without pay, effective immediately, from my position as Sanitation Man by reason of my invocation of my constitutional privilege against self-incrimination. That letter is in substance the same as that which is attached to the affidavit of Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

MARCUS F. KING.

(Sworn to December 9, 1966.)

**Affidavit of Joseph M. Barbara, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH M. BARBARA, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am an Assistant Foreman in the Department of Sanitation. I have been employed by the Department of Sanitation for 36 years, and am stationed at the 91st Street location. I am a Classified Civil Service employee.

On November 22, 1966, I appeared at the office of Arnold G. Fraiman, Commissioner of Investigation of the City of New York, without legal counsel. When I appeared Mr. Fraiman played a series of tape recordings which he indicated was a tape recording of a telephone conversation between myself and other persons.

Mr. Fraiman thereafter called in a stenographer and placed me under oath. He then asked me a number of questions which I declined to answer, stating that "I want to remain still".

Thereafter, on December 2, 1966, I received a letter bearing that date from Samuel J. Kearing, Jr., Commissioner of Sanitation. That letter stated that because I invoked my constitutional privilege against self-incrimination at the hearing before the Commissioner of Investigation, I was suspended, without pay, from my position, effective immediately. The letter was the same in substance

Affidavit of Peter I. Lombardo

as the letter annexed to the affidavit of Joseph Miranda, one of the plaintiffs in this action, sworn to this date and filed in support of the pending motion.

JOSEPH M. BARBARA

(Sworn to December 8, 1966.)

**Affidavit of Peter I. Lombardo, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PETER I. LOMBARDO, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitationman and have been employed by the Department of Sanitation for eighteen years. I am a civil service employee on the classified list, and a veteran of the Second World War.

On November 23, 1966, a representative of the Department of Investigation called upon me at my home and took me to the office of the Commissioner of Investigation. There I saw Mr. Fraiman who told me that a tape recording had been made of my telephone conversation with other people with respect to the subject matter of his investigation. He did not play any tape, but recited to me at least one statement that I was alleged to have made.

Affidavit of Philip D'Agostino

I made no answer to questions put to me by Mr. Fraiman. He then advised me to see an attorney. I then contacted Morris Weissberg, Esq., who returned with me and was present at Mr. Fraiman's office. I was then sworn and asked various questions which I declined to answer on the ground of my privilege against self-incrimination.

By letter of December 2, 1966, I was advised by the Commissioner of Sanitation that I had been suspended for invoking my privilege against self-incrimination. That letter is in substantially the same form as that attached to the affidavit of this date of Mr. Joseph Miranda.

PETER I. LOMBARDO

(Sworn to December 8, 1966.)

**Affidavit of Philip D'Agostino, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP D'AGOSTINO, being duly sworn, deposes and says:

I am one of the plaintiffs in this action.

I am a Sanitationman, and have been employed by the Department of Sanitation for eighteen years. I am a classified civil service employee, with tenure, under the Civil Service Law of the State of New York, and eligible

Affidavit of Philip D'Agostino

for retirement in three years. I am a member of the plaintiff union.

On November 23, 1966, I was instructed by an Assistant Foreman to go down to the office of the Commissioner of Investigation. I went to that office with Morris Weissberg, Esq., my attorney, where we met with Arnold G. Fraiman, the Commissioner of Investigation. Mr. Fraiman read me a statement to the effect that if I refused to answer questions, I would be suspended or dismissed under the New York City Charter.

I was placed under oath and asked various questions, many of which I declined to answer on the ground of my privilege against self-incrimination. I was then told to go back to work, and that I would be notified of my suspension. A stenographic record was made of the hearing.

Thereafter, I received a letter dated December 2, 1966 from the Commissioner of Sanitation. That letter, which in substance is the same as that addressed to Mr. Joseph Miranda and attached to his affidavit herein, advised me that I was suspended without pay, effective immediately, pursuant to Section 1123 of the New York City Charter because I had invoked my constitutional privilege against self-incrimination.

PHILIP D'AGOSTINO

(Sworn to December 8, 1966.)

**Affidavit of Anthony D'Ambrosio, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANTHONY D'AMBROSIO, being duly sworn, deposes and says:

I am one of the plaintiffs in this action.

I am an assistant foreman in the Department of Sanitation where I have been employed for twenty-three years. I am in the classified civil service of the State of New York. I am married and have three children.

On November 23, 1966, I was instructed to appear at the office of the Department of Investigation. I did so and was interrogated by Commissioner Fraiman. He played a tape recording of what he said was a conversation between me and another plaintiff, Mr. Bernard F. Bellettiere. I stated that I wanted an attorney, and was told to return on Friday, November 25, 1966 with a lawyer.

I did consult with counsel and returned on Friday, November 25, 1966 to Mr. Fraiman's office without, however, my counsel being present. Mr. Fraiman adjourned the matter and told me to return on Monday, November 28, 1966 with counsel, which I did. My attorney was John Landers, Esq. of Queens. Mr. Fraiman took Mr. Landers into another room where I am advised he played a tape recording for a half hour or more. I then consulted with Mr. Landers.

Affidavit of John L. Alessio

On the same day a stenographic record was made, and I was put under oath and interrogated by Mr. Fraiman.

On December 2, 1966, Superintendent David H. Beer of the Department of Sanitation advised me by telephone that I was suspended without pay from my position as assistant foreman, effective immediately.

On December 6, 1966, I received a letter from Commissioner Samuel J. Kearing, Jr., the Commissioner of Sanitation, which confirmed my suspension and stated that it "is based upon information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation." A copy of that letter is annexed hereto.

PHILIP D'AMBROSIO

(Sworn to December 8, 1966.)

**Affidavit of John L. Alessio, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN L. ALESSIO, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man employed by the Department of Sanitation for the last 15 years. I have been stationed at the 91st Street location for approximately the last five years.

Affidavit of John L. Alessio

I am an honorably discharged veteran and a Civil Service employee on the Classified list.

On Wednesday, November 23, 1966, at approximately 11:00 a.m. I appeared at the office of the Commissioner of Investigation, Arnold G. Fraiman, without legal counsel. Mr. Fraiman indicated he had tape recordings of telephone conversations, one of which he played to me. I recognized neither of the voices as my own. Mr. Fraiman then asked me a series of questions, none of which I comprehended. Mr. Fraiman then suggested that I return with a lawyer.

At approximately 3:00 p.m. on November 23, 1966, I appeared before Mr. Fraiman with my legal counsel, Morris Weissberg, Esq. I was placed under oath and asked a question which I did not understand. I responded that in January 1965, I suffered a serious injury to my head during the course of my employment, that I had been hospitalized as an out-patient for a period of six months immediately thereafter, and that since then I have not been able to understand the nature of many inquiries and frequently give answers which are not responsive to a question.

Immediately thereafter, I consulted with my legal counsel, who, I understand, then read a statement to Mr. Fraiman which described the nature of my injury.

I believe the hearing was adjourned without date, pending an examination by a city psychiatrist, which examination took place on November 25, 1966.

The psychiatrist I saw at the City Clinic apparently could make no diagnosis and referred me to the neurologist who I have been seeing since my injury, Dr. John Bianchi.

I then received a letter dated December 6, 1966, from Samuel J. Kearing, Jr., Commissioner of Sanitation, a copy of which is attached hereto as Exhibit A, which confirmed that I had been suspended without pay from my position as Sanitation Man on December 2, 1966. The letter indicated further that "This communication hereby confirms your

Affidavit of Michael A. Mango

suspension of Friday, December 2, 1966 which is based upon information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation".

JOHN L. ALESSIO

(Sworn to December 12, 1966.)

**Affidavit of Michael A. Mango, Read in Support of
Plaintiffs' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MICHAEL A. MANGO, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I have been an employee of the Department of Sanitation for 16½ years as a Sanitation Man, and have been stationed at the 91st Street location for the past three years. I am an honorably discharged veteran with a permanent disability of 20%, and I am a Civil Service employee on the Classified list.

On November 22, 1966, I appeared at the office of Arnold G. Fraiman, Commissioner of Investigation of the City of New York, without legal counsel. I was interviewed by Mr. Robert Ruskin, who played a series of tape recordings which he indicated was a tape recording of telephone conversations between myself and other persons. Mr. Ruskin then

Affidavit of Michael A. Mango

asked a series of questions which I refused to answer on the ground that I wanted to consult an attorney and to be advised of my rights.

Mr. Ruskin, despite my request, put me under oath and began to ask a series of questions. I indicated that I would not answer any questions without an attorney.

On November 23, 1966, I appeared at the office of Arnold G. Fraiman with my legal counsel, Morris Weissberg, Esq.

I was placed under oath and asked a series of questions which I declined to answer, stating that I invoked my constitutional privilege against self-incrimination.

Thereafter, on December 2, 1966, I received a letter bearing that date from Samuel J. Kearing, Jr., Commissioner of Sanitation. That letter stated that because I invoked my constitutional privilege against self-incrimination at the hearing before the Commissioner of Investigation, I was suspended from my position without pay, effective immediately. The letter was the same in substance as that sent to Joseph Miranda, one of the plaintiffs in this action and filed in support of the pending motion.

MICHAEL A. MANGO

(Sworn to December 9, 1966.)

Order to Show Cause on Defendants' Motion

(R. pp. 11-33)

UNITED STATES DISTRICT COURT**SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

Upon the summons and complaint herein, and upon the annexed affidavits of Arnold Guy Fraiman and Samuel J. Kearing, both sworn to the 16th day of December, 1966,

LET the plaintiffs' show cause before this Court at a civil motion part thereof, to be held in Room 506 of the United States Courthouse, Foley Square, New York, N.Y., on the 20th day of December, 1966 at 10:00 a.m. why an order should not be granted:

(1) Dismissing the complaint herein pursuant to Rule 12 (b) (6) of the Federal Rules of Civil procedure [sic] on the ground that said complaint fails to state a claim upon which relief can be granted; and

(2) Granting to the defendants such other and further relief as to the Court be just and proper [sic].

Sufficient reason appearing therefor, service of this order and the papers upon which it is based upon Rabine-witz & Boudin, Esqs., Morris Weissberg, Esq. and John J. De Lury, Jr., Esq. being the attorneys for the plaintiffs herein by leaving a copy thereof with the persons in charge of each of their offices, on or before the 16th day of December, 1966, shall be deemed good and sufficient service.

Dated: December 16th, 1966.

S/ EDMUND L. PALMIERI,
U.S.D.J.

**Affidavit of Samuel J. Kearing, Read in Opposition
to Plaintiffs' Motion and in Support of
Defendants' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SAMUEL J. KEARING, being duly sworn, deposes and says:

I am the Commissioner of the Department of Sanitation of the City of New York. I make this affidavit in opposition to plaintiffs' motion for a preliminary injunction and other relief, and in support of defendants' motion to dismiss the complaint.

Each of the plaintiffs is an employee of the Sanitation Department and is a member of the classified civil service subject to the disciplinary procedure set forth in Section 75 of the Civil Service Law.

On or about December 2, 1966, pursuant to the provisions of Section 75, I notified each of the plaintiffs that he was suspended pending determination of charges against him.

Under Section 75, an employee may be suspended without pay for a period not exceeding thirty days. On December 16, 1966 the formal charges against 12 of the plaintiffs were issued. A copy of a typical set of such charges is annexed hereto and marked Exhibit A. I expect to issue charges against the other plaintiffs at an early date. Each person charged has not less than eight days following

Affidavit of Samuel J. Kearing

receipt of charges to answer. At the present time no plaintiff has answered and no hearings have been held.

Hearings will be held promptly in accordance with law and the penalties, if any, imposed as a result must await the conclusion of such hearings. At the hearings each of the plaintiffs will have an opportunity with the advice of counsel to respond to the charges against him.

I am advised by counsel that in the event a decision is rendered as a result of the departmental hearings which is adverse to any of the plaintiffs herein such a decision may be reviewed in the Supreme Court of New York State under the provisions of Article 78 of the Civil Practice Law and Rules.

At the present time not one of the plaintiffs has been dismissed.

Defendants bring on this motion by order to show cause rather than by notice of motion since plaintiffs' motion for an injunction and other relief (also brought on by order to show cause) is now returnable on December 20, 1966 and thus this motion, which should be heard at the same time, could not be brought on by notice of motion.

No previous application for the relief sought herein has been made to any court or judge thereof.

WHEREFORE I respectfully request this Court to deny plaintiffs' motion in all respects and to grant defendants' motion to dismiss the complaint.

SAMUEL J. KEARING.

(Sworn to December 16, 1966.)

Exhibit A, Annexed to Foregoing Affidavit**CITY OF NEW YORK****DEPARTMENT OF SANITATION**

In the Matter of the Charges

against

PHILIP D'AGOSTINO

To:

PHILIP D'AGOSTINO
137 Greaves Avenue
Great Kills, S.I., N. Y.

PLEASE TAKE NOTICE that, pursuant to Section 75 of the New York Civil Service Law, you are hereby charged with misconduct in your official capacity as Sanitation Man in the New York City Department of Sanitation, in that:

In a private hearing conducted by the New York City Department of Investigation on November 23, 1966 as authorized by Chapter 34 of the New York City Charter, you refused to answer any questions regarding your official conduct, namely, questions regarding the performance of your duties as an employee of the New York City Department of Sanitation, on the ground that your answers would tend to incriminate you, after having been fully advised that such refusal to testify constitutes sufficient basis for the termination of your employment under Section 1123 of the New York City Charter.

The aforesaid constitutes unlawful conduct and reflects discredit upon the Department of Sanitation of the City of New York in violation of Rules 3(a) and 3(b) of the

*Exhibit A***Code of Discipline of the Department of Sanitation of the City of New York.**

You are hereby notified to appear before the duly designated Hearing Officer for a hearing on these charges on December 27, 1966 at 10:00 A.M. in Room 710, 125 Worth Street, New York City at which time you will be given an opportunity to answer the above charges.

Being a competitive employee, you may submit an answer to such charges in writing within eight days of receipt of these charges and you are entitled to be represented by counsel of your choice at the said hearing. You may also summon any witnesses to testify on your behalf.

You are further notified that upon the establishment of the truth of any or all of the above charges, you may be removed from your position or may be subject to whatever disciplinary action may be warranted.

Dated: New York City
December 16, 1966

SAMUEL J. KEARING, JR.
Commissioner, Department of Sanitation

**Affidavit of Arnold Guy Fraiman, Read in Opposition
to Plaintiffs' Motion and in Support of
Defendants' Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARNOLD GUY FRAIMAN, being duly sworn, deposes and says:

I am and at all times since January 1, 1966 have been the Commissioner of Investigation of the City of New York. I make this affidavit in opposition to plaintiffs' motion for an injunction and other relief and in support of defendants' motion to dismiss the complaint.

Section 803(2) of the New York City Charter authorizes and empowers the Commissioner of Investigation to

"... make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

Pursuant to this authority, and as a result of information furnished by a reliable informant, I instituted an investigation of a reported practice under which employees of the Department of Sanitation were:

1. accepting less than the proper fees due to the City of New York from private cart men for the use of the facilities of the Department of Sanitation at the Marine Transfer Station, 91st Street and East River, Manhattan,

Affidavit of Arnold Guy Fraiman

2. dividing the amounts received between themselves instead of paying them to the City.

My investigation showed that this practice indeed existed and that the City had been defrauded of hundreds of thousands of dollars in this way since at least 1959.

Some of the evidence in this investigation was obtained by a wiretap on a New York City telephone (AT-9-7935) leased for the transaction of official business by the Sanitation Department at its Marine Transfer Station at 91st Street and the East River, Manhattan.

This was the only wiretap used during this investigation. The wiretap was authorized by an order duly made by a Justice of the New York State Supreme Court, County of New York, pursuant to Section 813-a of the New York Code of Criminal Procedure.

If the injunctive relief sought herein is granted, it will prevent me and my Department from carrying out duties mandated by the New York City Charter and would compel the reinstatement of 16 employees of the Sanitation Department who appear to have betrayed their public trust. It is obvious that the City of New York and its citizens would be irreparably harmed by the granting of the relief sought. Plaintiffs, on the other hand, would not be irreparably harmed if the relief is denied since they will be afforded an administrative hearing and full judicial review with the opportunity for review by the United States Supreme Court if it can be shown their rights were violated. If plaintiffs or any of them are successful in the administrative or judicial proceedings which will proceed promptly if the premature relief sought herein is denied, they will be entitled under State law to reinstatement with back pay and the other benefits to which they would have been entitled had they remained on the City's payroll.

ARNOLD GUY FRAIMAN

(Sworn to December 16, 1966.)

**Affidavit of Leonard B. Boudin, Read in Opposition
Defendants' Motion**

(R. pp. 187-190)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

• [SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEONARD B. BOUDIN, being duly sworn, deposes and says:
I am the attorney for the plaintiffs in the within action.
Subsequent to the inception of the action, the Commissioner of Investigation transmitted, at my request, the transcripts of the hearings conducted before him involving the twelve plaintiffs who were suspended for asserting their constitutional privilege against self-incrimination. I have examined each of these transcripts and have noted that at the beginning of each of the hearings the Commissioner of Investigation made substantially the following statement:

"Q. Mr. [name of witness], this is a private hearing being conducted by the Department of Investigation of the City of New York, pursuant to Chapter 34, of the New York City Charter. The investigation in which you are about to testify relates particularly to the affairs, functions, accounts, methods, personnel and efficiency of the Department of Sanitation of the City of New York. I wish to advise you that you have all the rights and privileges guaranteed by the laws of the State of New York and the Constitutions of this State and of the United States,

Affidavit of Leonard B. Boudin

including the right to remain silent and the right not to be compelled to be a witness against yourself. I wish further to advise you that anything you say can be used against you in a court of law. You have the right to have an attorney present at this hearing, if you wish, and I understand that you are represented by counsel in the person of [name of attorney], is that correct? A. Yes.

Q. You are further advised that if you do refuse to testify or to answer any question regarding the affairs of the City or regarding your official conduct or the conduct of any other officer or employee of the City on the ground that your answer would tend to incriminate you, your term or tenure of office or employment shall terminate and you shall not be eligible to election or appointment to any office or employment under the City or any agency, in accordance with the provisions of Section 1123 of the New York City Charter."

The variations in the text relate only to the name of the witness and to his right to a lawyer or to the fact that he had a lawyer.

I have agreed with the attorneys for the Commissioner of Sanitation that at the hearings now scheduled for December 27, 1966 we will stipulate with respect to the accuracy of the transcripts and the fact that the twelve witnesses asserted their constitutional privilege against self-incrimination under the Constitution of the United States.

The hearings with respect to the other individual plaintiffs, other than Mr. Alessio, are scheduled to be held on the 28th of December, 1966. I have not as yet received the transcripts.

LEONARD B. BOUDIN.

(Sworn to December 21, 1966.)

Opinion and Order of Cannella, D. J.

(R. pp. 180-186)

Plaintiffs' motions, for declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure and for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, are denied without prejudice. Defendants' motion to dismiss the complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, is granted.

The facts upon which these motions are based are very simple. The individual plaintiffs are City employees working in the Department of Sanitation. While conducting an investigation of irregularities pursuant to Chapter 34 of the Charter of the City of New York, the Commissioner of Investigation obtained authorization in the Supreme Court, New York County, under the provisions of Section 813-a of the New York Code of Criminal Procedure to tap a particular telephone leased by the Department of Sanitation for the transaction of official business.

Subsequently, in November 1966, the Commissioner or his deputy, questioned the plaintiffs concerning their duties and employment. Twelve of them, after being advised that refusal to testify would result in termination of their employment, claimed their constitutional privilege against self incrimination and refused to testify. They were suspended on December 2, 1966 by the Commissioner of Sanitation pursuant to Section 1123 of the Charter of the City of New York.¹ Of the remaining four plaintiffs, one

¹ Section 1123 of the Charter of the City of New York provides in pertinent part that "if any . . . employee of the city, after lawful notice or process . . . having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city . . . or official conduct of any officer or employee of the city . . . on the ground that his answer would tend to incriminate him . . . his term or tenure of office or employment shall terminate."

Opinion and Order of Cannella, D. J.

claimed to be incompetent and refused to testify and the other three testified. All four were suspended on December 2, 1966 based on information received from the Commissioner of Investigation concerning irregularities arising out of their employment.

At the present time the twelve employees suspended pursuant to Section 1123 of the Charter of the City of New York are awaiting a hearing to be held on December 27, 1966 at which they may be assisted by counsel and present any defense in their behalf. The remaining four are awaiting the same type of hearing, the date of which has not yet been set.

The plaintiffs have brought this motion to have this court declare Section 813-a of the New York Code of Criminal Procedure and Section 1123 of the Charter of the City of New York, unconstitutional and to enjoin the defendants from using the material acquired by the wire-tapping and to order the plaintiffs reinstated in their positions.

The court finds that it has jurisdiction of these motions. 47 U.S.C. § 605; 42 U.S.C. § 1983; and 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

However, the general rule in the federal courts is that although it has jurisdiction it will abstain from exercising it in a case presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Further, the federal courts exercise the doctrine of abstention on grounds of comity with the states when the exercise of jurisdiction by the federal court would disrupt a state administrative process *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

The facts before this court present it with a disciplinary action between the City of New York and its employees.

Opinion and Order of Cannella, D. J.

At the present moment all of the sixteen employees are suspended and none can be dismissed until after the hearing.² *Conlon v. Murphy*, 24 A.D. 2d 737; 263 N.Y.S. 2d 360. Thus, this court denies plaintiffs' motions as premature and finds that the Administrative Code of the City of New York³ and the New York Civil Practice Laws and Rules⁴ provide adequate review of administrative decisions.

Further, this court exercises its right of abstention on the ground that plaintiffs' rights will be adequately protected under state remedies.⁵ Action by this court at this time would be an undue interference with the state process. *Burford v. Sun Oil Co.*, *supra*; *Fenster v. Leary*, 66 Civ. 1927 (S.D.N.Y. December 7, 1966, Kaufman, C.J., Mansfield and Tenney, D.JJ.).

It should be noted, however, that the court's conclusion that plaintiffs have not met the requirements of 28 U.S.C. § 2201 for a declaratory judgment at this juncture of the administrative proceeding, is in no manner a determination by this court that Section 813-a of the New York Code of Criminal Procedure and Section 1123 of the Charter of the City of New York are constitutional. This court is confident that the state courts of New York are sensitive to and will

² The contention by the plaintiffs that they are automatically dismissed and that the hearings are only *pro forma* hearings is an issue which ought to be decided by a state and not a federal court. *Harrison v. N.A.A.C.P.*, 360 U.S. 167 (1959).

³ See: Administrative Code of the City of New York § 752-6.0(d).

⁴ See: CPLR §§ 7801-06; §§ 6301-15; § 3017.

⁵ *Daniman v. Board of Education*, 306 N.Y. 532, 119 N.E. 2d 373 (1954), *rev'd* on other grounds, *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Roosevelt Raceway v. Co. of Nassau*, 18 N.Y. 2d 30 (1966).

Opinion and Order of Cannella, D. J.

give careful consideration to the very serious constitutional issues that the plaintiffs have raised herein.

So ordered.

Dated: New York, N. Y.,
December 27, 1966.

JOHN M. CANNELLA,
U. S. D. J.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 381—September Term, 1966.

(Argued March 23, 1967 Décided September 20, 1967.)

Docket No. 31014

UNIFORMED SANITATION MEN ASSOCIATION, INC., LEONARD MONTELEONE, AUGUST MASCIA, JOSEPH MIRANDA, NUNZIO CHIERICO, BERNARD F. BELLETTIERE, NICHOLAS J. CARUSO, ANSELMO QUINONES, ANTHONY CALABRESE, JAMES D. MINTER, MARCUS F. KING, JOSEPH BARBARA, PETER I. LOMBARDO, PHILIP D'AGOSTINO, ANTHONY D'AMBROSIO, JOHN L. ALESSIO and MICHEAL A. MANGO,

Plaintiffs-Appellants,

—v.—

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK,
COMMISSIONER OF INVESTIGATION OF THE CITY OF NEW
YORK, and THE CITY OF NEW YORK,

Defendants-Appellees.

Before:

MOORE and HAYS, *Circuit Judges*, and
DOOLING, *District Judge*.*

* Of the Eastern District of New York, sitting by designation.

Opinion of the Court of Appeals

Appeal from an order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge*, denying plaintiffs' motions for a preliminary injunction and discovery and granting defendants' motion to dismiss the complaint in an action to enjoin defendants from violating plaintiffs' constitutional rights.

Affirmed.

LEONARD B. BOUDIN (Victor Rabinowitz, of counsel, Rabinowitz & Boudin, Morris Weissberg, and John J. DeLury, New York, New York, on the brief), *for Appellants*.

JOHN J. LOFLIN (Frederick S. Nathan and Robert C. Dinerstein, of counsel, J. Lee Rankin, Corporation Counsel of the City of New York, on the brief), *for Appellees*.

HAYS, Circuit Judge:

This is an appeal from an order of the United States District Court for the Southern District of New York in an action to enjoin defendants from violating plaintiffs' constitutional rights, denying plaintiffs' motion for summary judgment and granting defendants' motion to dismiss the complaint. We affirm the dismissal of the complaint, although on grounds different from those on which the district court relied.

There is no dispute as to the material facts. Some time in 1966 the defendant Commissioner of Investigation of the City of New York was informed that employees in the Department of Sanitation were not charging private cartmen the proper fees for use of City facilities at the Marine Transfer Station, located at 91st Street and the East River in Manhattan, and that these employees were diverting to

Opinion of the Court of Appeals

themselves the proceeds of the fees they did charge, thus causing the City to lose hundreds of thousands of dollars of revenue. Exercising his powers under Section 803(2) of the New York City Charter,¹ the Commissioner undertook an investigation of these irregularities. He obtained a court order in the Supreme Court, New York County, under the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York,² authorizing him

¹ Section 803(2) of the New York City Charter provides:

"The Commissioner:

* * *

2. Is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

² Section 813-a of the Code of Criminal Procedure provides:

"Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court . . . upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead [sic], or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice . . . may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice . . . who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest . . ."

Opinion of the Court of Appeals

to tap a certain telephone leased by the Department of Sanitation for the transaction of official business at the Marine Transfer Station.

Thereafter in November, 1966, the Commissioner or a deputy in the Commissioner's office questioned each of the individual plaintiffs³ concerning his duties and employment and his activities at the Marine Transfer Station. At these hearings the employee was advised of his constitutional rights, including his right to counsel, his right to remain silent and his right not to be compelled to be a witness against himself.⁴ However, the employees were further advised that:

"[I]f you do refuse to testify or to answer any question regarding the affairs of the City or regarding your official conduct or the conduct of any other officer or employee of the City on the ground that your

³ The Uniformed Sanitation Men Association, Inc., is the collective bargaining representative of the employees of the Department of Sanitation.

⁴ At the beginning of each of the hearings the Commissioner of Investigation made substantially the following statement:

"Q. Mr. [name of witness], this is a private hearing being conducted by the Department of Investigation of the City of New York, pursuant to Chapter 34, of the New York City Charter. The investigation in which you are about to testify relates particularly to the affairs, functions, accounts, methods, personnel and efficiency of the Department of Sanitation of the City of New York. I wish to advise you that you have all the rights and privileges guaranteed by the laws of the State of New York and the Constitutions of this State and of the United States, including the right to remain silent and the right not to be compelled to be a witness against yourself. I wish further to advise you that anything you say can be used against you in a court of law. You have the right to have an attorney present at this hearing, if you wish, and I understand that you are represented by counsel in the person of [name of attorney], is that correct?"

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answer would tend to incriminate you, your term or tenure of office or employment shall terminate and you shall not be eligible to election or appointment to any office or employment under the City or any agency, in accordance with the provisions of Section 1123 of the New York City Charter.”⁵

They were also told that, under the judicially authorized wiretap, recordings had been made of their conversations on the Marip Transfer Station telephone.

Twelve of the plaintiffs, asserting the constitutional privilege against self-incrimination (see *Malloy v. Hogan*, 378 U. S. 1 (1964)), refused to testify, three answered the questions put to them and did not assert the privilege, and one refused to testify claiming to be incompetent.⁶ On December 2, 1966 all the appellants were suspended by the defendant Commissioner of Sanitation. The twelve who had invoked the privilege against self-incrimination were ad-

⁵ Section 1123 of the New York City Charter provides:

“Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any such officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.”

⁶ The parties agree that since the charges against this employee have been withdrawn his case is now moot.

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vised that their suspensions were based on their refusals to testify as provided by Section 1123 of the City Charter. The other appellants were advised by the Commissioner of Sanitation that their suspensions were "based upon information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation."

Appellants sought a declaratory judgment that the suspensions under Section 1123 of the City Charter violate their rights under the Fifth and Fourteenth Amendments to the United States Constitution and that the wiretapping authorized by Section 813-a of the New York Code of Criminal Procedure violates the Federal Communications Act of 1934, 47 U. S. C. § 605⁷ and also impairs their rights under the Fourteenth Amendment. They ask for an injunction reinstating them to their positions and prohibiting defendants from continuing the wiretap and from using against them information obtained by wiretapping.

What we have said constitutes the factual background of the case as it appears in the record and as it was pre-

⁷ Section 605 of 47 U. S. C. provides:

"Unauthorized publication or use of communications.

... [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . ."

Opinion of the Court of Appeals

sented to the district court. It is important, however, to consider certain events which have occurred since the district court's decision was rendered and about which there is no dispute.

While the case was pending in the district court formal charges were issued against the appellants under Section 75 of the New York Civil Service Law.* In accordance with the requirements of that statute, disciplinary hearings were held at which appellants were represented by counsel. The twelve appellants who had invoked the privilege against self-incrimination were dismissed from their positions after these hearings. The evidence on which the dismissals were based consisted of the transcripts of the

* Section 75 of the Civil Service Law provides in pertinent part:

"Removal and other disciplinary action

1. Removal or disciplinary action. A person described in . . . this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

* * *

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. . . . "

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proceedings before the Commissioner of Investigation in which the appellants had asserted the privilege. Section 1123 of the City Charter was cited as the legal basis for the dismissals.

The other three employees, originally charged with having engaged in irregularities during the course of their employment, were summoned before the grand jury and asked to sign waivers of immunity. When they refused the Department of Sanitation served them with amended charges alleging that by refusing to waive their immunity they had violated Section 1123. After hearings pursuant to Section 75 of the Civil Service Law, they too were discharged for having violated Section 1123.

It may well be argued that the action should have been dismissed by the district court on the ground that plaintiffs had failed to exhaust their administrative remedies. However we would be taking a futilely overtechnical position if we refused to consider the administrative action taken since the district court rendered its decision. In the light of that action we cannot uphold dismissal on the ground of failure to exhaust administrative remedies.

I.

Appellants contend that they have been deprived of their constitutional privilege against self-incrimination because, under Section 1123, they were compelled "either to forfeit their jobs or to incriminate themselves," citing *Garrity v. New Jersey*, 385 U. S. 493 (1967).

The district court abstained from deciding this issue on the ground that the Section should first be construed by the state courts. Cf. *Holland v. Hogan*, 67 Civ. 1223, decided June 27, 1967 (statutory three-judge court). After the district court's decision and while the present appeal was pending the New York Court of Appeals decided the case of *Gardner v. Broderick*, — N. Y. 2d —, — N.E. 2d,

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—, — N. Y. S. 2d — (1967), the opinion in which authoritatively construed Section 1123. The *Gardner* case removed any ground there may have been for federal abstention.

We are therefore faced with the issue on appeal as to whether city employees who refuse to answer questions as to their conduct in office and who plead their privilege against self-incrimination are constitutionally protected against discharge. The answer seems to us to be clear. It was surely proper for a city official charged with the duty to do so to investigate charges of misfeasance in the operation of the Sanitation Department and in connection with such an investigation to question employees about their participation in activity which reflected the possibility of bribery and embezzlement. Can there be any reasonable doubt that an employee, especially one who has been warned of the consequences of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?

An employee's "failure to give information which . . . the State has a legitimate interest in securing" constitutes insubordination. *Nelson v. County of Los Angeles*, 362 U. S. 1, 7 (1960).

There was no invasion of appellants' constitutional rights when they were dismissed from their employment for refusing to answer questions as to their conduct of their jobs.

Garrity v. New Jersey, *supra*, does not support appellants' position. In *Garrity* the Supreme Court held that testimony which was coerced by threat of loss of employment could not be used in a subsequent criminal proceeding. That holding has no application to the present case where the employees did not testify, but relied upon their claims of privilege.

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II.

We also hold that appellants' claim based on the Commissioner's wiretap was properly dismissed. No violation of the Federal Communications Act, 47 U. S. C. § 605 (reprinted in note 6, *supra*), or deprivation of rights under the Fourth Amendment has been established.

The telephone on which appellants' conversations were overheard was leased by the City of New York and assigned to the Department of Sanitation for the conduct of its official business. There was no invasion of appellants' right of privacy since the telephone was not a private telephone nor did it belong to appellants.

The "search" was not unreasonable within the meaning of the Fourth Amendment. The conversations overheard were being conducted in the course of the discharge of appellants' official duties. The content of these conversations is analogous in some ways to official documents which are not protected against such a search.

"[I]n the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. If he has embezzled the public moneys and falsified the public accounts he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-incrimination." *Wilson v. United States*, 221 U. S. 361, 380 (1911). See *Davis v. United States*, 328 U. S. 582 (1946).

In *United States v. Collins*, 349 F. 2d 863 (2d Cir. 1965), cert. denied, 383 U. S. 960 (1966), objection was raised on

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constitutional grounds to the introduction of evidence of mail theft where the evidence was obtained from a search of defendant's work jacket. We said at p. 868:

"We hold, then, that, in the circumstances of this case, the search by government agents who were investigating the theft of property connected with the defendant's employment, of defendant's work jacket hanging in a public area in the Government office where he was employed, was reasonable within the intendment of the Fourth Amendment and, therefore, not unconstitutional." See also *State v. Giardina*, 27 N.J. 313 (1958).

In our view the recent decision of the Supreme Court in *Berger v. New York*, 388 U. S. 41 (1967), has no bearing on the present case. In the *Berger* case "trespassory intrusions into private, constitutionally protected premises" were claimed. The protection of privacy is not involved in our case where the conversations overheard were carried on in the course of the city's business over a telephone leased by the city for the purpose of such official use.

In *Berger* the Court held that the procedure prescribed by § 813-a of the New York Code of Criminal Procedure was constitutionally insufficient, under the circumstances there presented, to justify the use in criminal proceedings of the evidence secured by eavesdropping. We hold in the case now before us only that, if resort to § 813-a was necessary at all, the provisions of that Section provide whatever protection is needed for monitoring the conversations of the employees and for the use to which the monitored conversations were put.

The action of the district court in dismissing the complaint for failure to state a claim on which relief can be granted is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of September one thousand nine hundred and sixty-seven.

Present:

HON. LEONARD P. MOORE,

HON. PAUL R. HAYS,

Circuit Judges,

HON. JOHN F. DOOLING, JR.,

District Judge.

UNIFORMED SANITATION MEN ASSOCIATION, INC., LEONARD MONTELEONE, AUGUST MASCIA, JOSEPH MIRANDA, NUNZIO CHIERICO, BERNARD F. BELLETTIERE, NICHOLAS J. CARUSO, ANSELMO QUINONES, ANTHONY CALABRESE, JAMES D. MINTER, MARCUS F. KING, JOSEPH BARBARA, PETER I. LOMBARDO, PHILIP D'AGOSTINO, ANTHONY D'AMBROSIO, JOHN L. ALESSIO and MICHAEL A. MANGO,

Plaintiffs-Appellants,

v.

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK,
COMMISSIONER OF INVESTIGATION OF THE CITY OF NEW YORK,
and the CITY OF NEW YORK,

Defendants-Appellees.

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

Order Allowing Certiorari

SUPREME COURT OF THE UNITED STATES

No. 823 — , October Term, 1967

**UNIFORMED SANITATION MEN
ASSOCIATION, INC., et al.,**

Petitioners,

against

**COMMISSIONER OF SANITATION
OF THE CITY OF NEW YORK, et al.,**

Respondents.

ORDER ALLOWING CERTIORARI. January 29, 1968.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 673.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.